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No. 84-

IN THE

Supreme Court of the United States

OCTOBER TERM 1984

THE SOUTHLAND CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR WRIT OF CERTIORARI

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Dated: June 15, 1985

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Questions Presented for Review

1. Whether the Court of Appeals erred in holding that ignorance of the law is not a defense in a conspiracy case, thereby eliminating specific intent as an element of the offense.

2. Whether the Court of Appeals erred in applying two statutes of limitations to a one-count indictment that alleged a single criminal conspiracy with two objectives.

TABLE OF CONTENTS

	Page
OPINION BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	5
I. THE COURT OF APPEALS ERRED IN HOLDING THAT IGNORANCE OF THE LAW WAS NOT A DEFENSE BECAUSE, WITHOUT KNOWLEDGE OF THE ALLEGED TAX LIABILITY, SOUTHLAND COULD NOT HAVE FORMED THE REQUISITE SPECIFIC INTENT TO DEFRAUD	6
II. THE COURT OF APPEALS IMPROPERLY EXTENDED THE STATUTE OF LIMITATIONS BY ERRONEOUSLY HOLDING THAT THE JURY COULD APPLY TWO SUCH STATUTES TO THE SINGLE CONSPIRACY CHARGED	11
CONCLUSION	15
APPENDIX	
Opinion of the Court of Appeals	1a
Judgment of the District Court	36a
Relevant Statutory Provisions	37a

TABLE OF AUTHORITIES

	Page
CASES:	
Anthony v. *United States,* 667 F.2d 870 (10th Cir. 1981), *cert. denied,* 457 U.S. 1133 (1982)	8,11
Braverman v. *United States,* 317 U.S. 49 (1942)	12,13
Bridges v. *United States,* 346 U.S. 209 (1953)	6,15
Dennis v. *United States,* 171 F.2d 986 (D.C. Cir. 1948), *aff'd,* 339 U.S. 162 (1950)	8
Dennis v. *United States,* 384 U.S. 855 (1966)	6,11,15
Ingram v. *United States,* 360 U.S. 672 (1959)	*passim*
Toussie v. *United States,* 397 U.S. 112 (1970)	*passim*
United States v. *Bass,* 404 U.S. 336 (1971)	14
United States v. *Bryza,* 522 F.2d 414 (7th Cir. 1975), *cert. denied,* 426 U.S. 912 (1976)	8,11
United States v. *Feola,* 420 U.S. 671 (1975)	8
United States v. *Habig,* 390 U.S. 222 (1968)	11,14
United States v. *Head,* 641 F.2d 174 (4th Cir. 1981), *cert. denied,* 103 S. Ct. 3113 (1983)	12
United States v. *Petersen,* 513 F.2d 1133 (9th Cir. 1975)	9,11
United States v. *Schilleci,* 545 F.2d 519 (5th Cir. 1977)	8
United States v. *Smith,* 592 F. Supp. 424 (E.D. Va. 1984)	8,11
United States v. *Tarnopol,* 561 F.2d 466 (3d Cir. 1977)	7
United States v. *United States Gypsum Co.,* 438 U.S. 422 (1978)	10

	Page
STATUTES:	
18 U.S.C. § 371	1,9
§ 641	9,11
§ 793	11
§ 794	11
§ 1342	11
§ 1952	1
§ 2511	11
§ 3282	12
26 U.S.C. § 162	9
§ 6531	12
28 U.S.C. § 1254(1)	1
MISCELLANEOUS:	
B. Bittker, *Federal Taxation of Income, Estates and Gifts* (1981)	9

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OPINION BELOW

The opinion of the Court of Appeals for the Second Circuit (Nos. 479, 534—August Term 1984) is reproduced at App. 1a—35a.

JURISDICTION

The opinion of the Court of Appeals was filed April 23, 1985. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 371 and 3282 of Title 18 and Section 6531 of Title 26 are set forth at App. 37a—39a.

STATEMENT OF THE CASE

On June 8, 1984 petitioner The Southland Corporation ("Southland") was convicted following a three-week jury trial and seven days of deliberations in the United States District Court for the Eastern District of New York (Sifton, J.), of conspiring to defraud the Internal Revenue Service, *see* 18 U.S.C. § 371. The Court of Appeals for the Second Circuit affirmed that conviction on April 23, 1985. Southland seeks a writ of certiorari to review that ruling.

* * *

On May 4, 1983, a Federal grand jury indicted Southland for conspiracy to violate the Travel Act. A Southland employee, Eugene DeFalco, also was charged with that crime, as well as wire fraud and mail fraud based on his embezzlement from Southland.

On September 12, 1983, DeFalco pled guilty to the Travel Act conspiracy. In return for his plea and cooperation, the Government agreed to drop the embezzlement charges. Thereafter, a superseding indictment issued, broadening the allegations against Southland and adding a new defendant, Southland vice president S. Richmond Dole.[1]

The new indictment also had a single count. However, out of the Government's admitted concern that the statute of limitations might have run on the original conspiracy charge, this indictment charged Southland and Dole with one conspiracy having two separate objectives: *first,* violation of the Travel Act, 18 U.S.C. § 1952, by using a facility of interstate commerce to bribe an unnamed employee of the New York State Tax Commission; and *second,* fraud upon the Internal Revenue Service, 18 U.S.C. § 371, by deducting the alleged bribe moneys on the Company's 1977 tax return, and thereby obstructing the Internal Revenue Service's revenue-collecting functions.

At trial, the Government's case centered on the testimony of DeFalco. He claimed that he was involved initially in a

[1] In addition, Eugene Mastropieri, who was indicted separately, was subsequently joined as a defendant.

bribery scheme, and only later embezzled all the bribe moneys. No bribe was ever paid or even offered to a public official. Neither DeFalco nor any other witness even hinted that tax fraud was ever an objective of the alleged conspiracy.

In January 1977, Southland retained Eugene Mastropieri, a lawyer and New York City councilman, as counsel in a long-standing sales tax dispute with the New York State Tax Commission. Shortly thereafter, according to DeFalco, Mastropieri suggested bribing state employees involved in the cases, and DeFalco concurred. A portion of Mastropieri's legal fee was to be used to effectuate a bribe. That was the sum total of their alleged agreement. DeFalco specifically affirmed that he and Mastropieri never discussed Southland's federal income taxes or agreed to defraud the Internal Revenue Service.

DeFalco also claimed to have informed others at Southland of Mastropieri's intentions. However, again, he never suggested that he discussed with anyone Southland's taxes generally or the treatment of Mastropieri's legal fee on the Company's federal income tax return.

The record established in addition that DeFalco and others considered several ways of disguising or concealing the Mastropieri legal fee. Ultimately, these alternatives were rejected. Mastropieri billed the fee as what it was, a legal fee, and Southland paid it by check. There was no evidence that Southland's federal income taxes were considered in connection with this issue.

Mastropieri, upon receiving his check, promptly turned over the entire proceeds to John Kelly, a security consultant for Southland and an alleged co-conspirator. It is undisputed that Kelly and DeFalco thereafter stole the entire amount, including $20,000 supposedly set aside for bribery.

Southland's defense at trial was that DeFalco never intended a bribe—that he planned to embezzle the fee from the outset. But whatever his intent with respect to the alleged bribery objective, DeFalco never testified that he intended to obstruct the functions of the Internal Revenue Service or to

deprive the United States of tax revenues. Nor did he or any other witness ever suggest that they thought the fee could not properly be deducted.

The evidence also focused on an internal questionable payments investigation that Southland initiated in the summer of 1977 upon a request from the Securities and Exchange Commission. During that investigation, various employees received questionnaires and were interviewed.

As part of this review, in-house lawyers and the Company's outside counsel investigated the Mastropieri fee. What they uncovered left them suspicious, but they concluded that there was no concrete proof of wrongdoing. There was a dispute at trial whether that conclusion was in good faith. However, it was undisputed that no questionnaire, interview or discussion during the investigation so much as touched upon Southland's federal tax liability arising from the Mastropieri fee. Although after the investigation, Southland's General Counsel and another in-house attorney questioned an outside tax lawyer regarding the fee, the record does not reveal what they said to him or his response.[2]

In mid-1978, while the Internal Revenue Service was auditing Southland's tax returns for tax years well before the events at issue in this case, Southland's General Counsel voluntarily informed the Internal Revenue Service auditors of the questionable payments investigation. He told them that the review had uncovered political contributions by Southland that might have been deducted improperly.[3] Without a summons, Southland turned over to the Internal Revenue Service the investigative report along with underlying questionnaires.

Two Internal Revenue Service auditors testified, however, that they had not seen questionnaire responses referring to the

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[2] In suggesting that Southland did not disclose to the outside lawyer the purpose of the Mastropieri fee (App. 10a), the Court of Appeals supplied facts the record did not. The Southland attorney who testified on this issue was never asked whether in words or substance he conveyed to tax counsel any concern about an illegal payment, and the government did not call the tax lawyer as a witness.

[3] The Court of Appeals' suggestion that the Internal Revenue Service learned of the investigation "apparently by accident" (App. 10a) is flatly incorrect.

Mastropieri matter. The Government contended that this alleged omission showed guilty knowledge of the alleged bribery scheme. However, the Government never suggested to the District Court or the jury that the issue had any relevance to the charge that Southland had conspired to defraud the United States.

The last overt act alleged to be in furtherance of the tax objective of the conspiracy was the filing of Southland's 1977 corporate income tax return in September 1978. For 1977, Southland paid over $35 million in taxes and took over $668 million in deductions. It actually overpaid its taxes by $142,000.

The individual responsible for preparing the return testified for the Government. He identified no alleged co-conspirator who was involved in preparing the Company's 1977 tax return, in rendering decisions about the tax treatment of expenses, or in making any other judgment concerning Southland's federal income taxes. And he did not suggest that he or anyone allegedly involved in the conspiracy believed the $96,500 Mastropieri fee could not properly be deducted.

After a three-week trial, the jury deliberated for seven days before finding Southland guilty of conspiracy to defraud the Internal Revenue Service. The jury did not convict Southland on the Travel Act objective.[4] It was unable to reach a verdict with respect to Southland vice president Dole, and the District Court declared a mistrial as to him.[5] Dole subsequently was tried again and acquitted of all charges.

The Court of Appeals for the Second Circuit affirmed Southland's conviction. This petition followed.

REASONS FOR GRANTING THE WRIT

The decision in this case conflicts with decisions of this Court and other Courts of Appeals. It raises issues important

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[4] The Court submitted a special verdict form to the jurors requiring them to specify the objective or objectives on which they based their verdict.

[5] The third defendant, Eugene Mastropieri, was convicted of both objectives.

not only in conspiracy cases, but in every federal prosecution where the offense requires proof of specific intent to commit the crime.

First, the Court of Appeals ignored the explicit directive of this Court in *Ingram* v. *United States,* 360 U.S. 672 (1959), and excused the Government from proving that Southland knew the payment to Mastropieri could not properly be deducted on the Company's 1977 federal tax returns. Instead of following *Ingram's* directive that knowledge of tax liability is essential, the Court misapplied the generality that ignorance of the law is no defense. In so holding, the Court placed itself in conflict with other circuits that have found ignorance as to a matter of law to be a defense if it negates the specific intent necessary to violate the law. This issue is critical in defining the scope of liability under numerous criminal statutes.

Second, the Court of Appeals erred in applying two statutes of limitations to the single criminal conspiracy. The ruling not only creates a square conflict among the circuits; it also is without basis in logic or precedent. If left undisturbed, the Court of Appeals' decision will undermine the policy of repose and the rule of lenity which this Court has sought repeatedly to safeguard.

I. THE COURT OF APPEALS ERRED IN HOLDING THAT IGNORANCE OF THE LAW WAS NOT A DEFENSE BECAUSE, WITHOUT KNOWLEDGE OF THE ALLEGED TAX LIABILITY, SOUTHLAND COULD NOT HAVE FORMED THE REQUISITE SPECIFIC INTENT TO DEFRAUD

This case involved, first and foremost, the allegation that Southland conspired to bribe a state official. The initial indictment against Southland alleged that conspiracy alone. The tax fraud charge was appended for the first time when the Government issued a superseding indictment, adding a defendant who had a substantial statute of limitations defense to a bribery conspiracy. That charge was a transparent example of the sort of "prosecutorial sleight of hand to overcome a time bar" which this Court condemned in *Dennis* v. *United States,* 384 U.S. 855, 863 (1966), and *Bridges* v. *United States,* 346 U.S. 209, 223-24 (1953).

The *only* crime of which Southland was convicted was conspiracy to defraud the Internal Revenue Service. A central element of that crime is a specific "intent to impede and obstruct the functions of the Internal Revenue Service." *United States* v. *Tarnopol,* 561 F.2d 466, 474 (3d Cir. 1977). The Government had the burden of proving that element beyond a reasonable doubt. The Court of Appeals, however, absolved the Government from doing so. Indeed, the Court effectively read this element out of the law.

The facts adduced at trial established that Southland deducted the Mastropieri fee from its 1977 federal income tax return. However, they showed nothing about the *intent* underlying that deduction. There was no document, no testimony, no suggestion at all that any conspirator knew the fee was not deductible if intended to pay or facilitate a bribe. In short, even if the funds paid Mastropieri were intended for bribery and the alleged conspirators had agreed to treat that money as an expense that could be deducted, those facts would not establish an agreement to defraud the United States absent some evidence that at least one of them was aware the deduction was improper. Unless they knew the deceit had some illicit tax consequence, they could no have intended to direct it against the Internal Revenue Service. Specific intent to defraud that agency would be lacking.

This Court held as much in *Ingram v. United States,* 360 U.S. 672 (1959), a decision cited to the Court of Appeals, yet studiously ignored in its opinion. In *Ingram,* this Court reversed the conviction of two employees of an illegal lottery for conspiring to evade the federal wagering tax. As here, the Government tried to prove the case circumstantially—by showing that the defendants were intimately involved in the operation, conducted it secretly and apparently knew that it generated a profit. *Id.* at 678-79.

This Court held that without independent proof of the defendants' *knowledge* of the tax liability arising from the prohibited operation, there could be no permissible inference that the defendants "were motivated by a purpose to evade payment of federal taxes." *Id.* at 680. Testimony regarding

what was done by the conspirators and speculation about why they did it simply were insufficient to establish the essential element of conspiratorial intent:

> "Evidence that [the defendants] might have wanted the taxes to be evaded if they had known of them and that they engaged in conduct that could have been in furtherance of a plan to evade the taxes if they had known of them, is not evidence that they did know of them." *Id.*

The Court in *Ingram* took pains to set forth the critical equation the Court of Appeals here ignored:

> " '*Without the knowledge the intent cannot exist* . . . . Furthermore, to establish the intent, the evidence of knowledge must be *clear, not equivocal* . . . . This, because charges of conspiracy are not to be made out by piling inference upon inference, thus fashioning . . . a dragnet to draw in all substantive crimes.' " *Id.* (*quoting Direct Sales Co.* v. *United States,* 319 U.S. 703, 711 (1943)) (emphasis supplied).

In place of this requirement of knowledge, the Court of Appeals misapplied the stock proposition that "[i]gnorance of the law is no defense." (App. 11a.) In resorting to this legal commonplace even though the crime alleged requires proof of specific intent, the Second Circuit placed itself directly in conflict not only with *Ingram,* but also with other decisions of this Court and of other circuits. *See, e.g., United States* v. *Feola,* 420 U.S. 671, 695 (1975) ("the state of knowledge of the parties to an agreement is not always irrelevant in a proceeding charging a violation of conspiracy law"); *United States* v. *Schilleci,* 545 F.2d 519, 524 (5th Cir. 1977) ("The ignorance of the defendant of the applicable law went to the heart of his denial of the specific intent necessary for a violation of the law."); *see also Anthony* v. *United States,* 667 F.2d 870, 877 (10th Cir. 1981), *cert. denied,* 457 U.S. 1133 (1982); *United States* v. *Bryza,* 522 F.2d 414, 424 (7th Cir. 1975), *cert. denied,* 426 U.S. 912 (1976); *Dennis* v. *United States,* 171 F.2d 986, 990 (D.C. Cir. 1948), *aff'd,* 339 U.S. 162 (1950). *Cf. United States* v. *Smith,* 592 F. Supp. 424, 431 (E.D. Va. 1984)

("It is settled law that a mistake of law is a defense where it negates the intent required by the charged offense.").

The conflict created by the Court of Appeals is most stark with the decision of the Ninth Circuit in *United States* v. *Petersen,* 513 F.2d 1133 (9th Cir. 1975). That case, like this one, involved a charge of conspiracy to defraud the United States. The theory of the defense was that the defendants "lacked the specific intent required for a conviction under 18 U.S.C. sections 371 and 641 [embezzlement of federal property]." *Id.* at 1134. The District Court instructed the jurors that "ignorance of the law is not an excuse." *Id.* at 1135. The Court of Appeals reversed the ensuing conviction because "the judge's summary treatment of the meaning of ignorance of the law may have caused the jury to eliminate it as a factor affecting specific intent." *Id.*

These cases cannot be reconciled. Moreover, the Second Circuit's position in the controversy is neither logical nor fair. In essence, the Court found that one can possess a specific intent to defraud the Government by taking an improper deduction without knowing that the deduction is improper. If so, the element of specific intent is meaningless and of no legal effect.

The Court below purported to find an alternative basis for sustaining Southland's conviction. It suggested that the Company actually was aware that deducting the Mastropieri fee would defraud the United States.[6] Yet the facts show, at most,

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[6] As part of this argument, the Court noted that "it is absurd to suppose that the Southland officials concerned with the Mastropieri matter did not know that deductions may be taken only for 'ordinary and necessary' business expenses, 26 U.S.C. § 162(a), and that a bribe is not such an expense." (App. 11a.) However clear the deductibility of the fee might be to a learned appellate judge, it would not necessarily be so to an ordinary businessman, who might incorrectly assume, as DeFalco did in his testimony, that "[a]ll business expenses are deductible" (Tr. 137). *Cf.* 1 B. Bittker, *Federal Taxation of Income, Estates and Gifts* ¶ 20.3.1 (1981) ("The 'ordinary and necessary' qualification has been included in the tax law since the Revenue Act of 1913, but its scope has never been authoritatively delineated and remains uncertain to this day.").

The Government, in any event, was required to *prove* the defedants' knowledge. It could not rely on supposition.

knowledge that an illegal scheme was being concealed, not that such concealment would give rise to a federal tax liability.[7] Again, the approach taken by the Court of Appeals is in direct conflict with this Court's opinion in *Ingram:*

> "This is not a case where efforts at concealment would be reasonably explainable only in terms of intention to avoid taxation. Here, the criminality of the enterprise under local law provided more than sufficient reason for the secrecy in which it was conducted. A conspiracy, to be sure, may have multiple objectives, and if one of its objectives, even a minor one, be the evasion of federal taxes the offense is made out, though the primary objective may be the concealment of another crime. But the fact that payment of federal taxes . . . might have resulted in disclosure of the lottery and subsequent prosecution of [defendants] by legal authorities would permit an inference that concealment of the lottery was motivated by a purpose to evade payment of federal taxes *only if, independently, there were proof that [defendants] knew of the tax liability."* 360 U.S. at 679-80 (citations omitted) (emphasis supplied).

The Court below did not search for independent proof of knowledge as *Ingram* directed. It simply looked at an effect of the alleged conspirators' conduct, determined that this effect might have served their conspiratorial ends and presumed, therefore, that they necessarily harbored a specific intent to achieve that particular result. The application of such a presumption, whether by jurors or by reviewing courts, is insufficient to establish the requisite intent. *See United States* v. *United States Gypsum Co.,* 438 U.S. 422, 435 (1978)

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[7] The only evidence that focuses on possible knowledge concerning the deductibility of the fee is the conversation by in-house lawyers with outside tax counsel. *See supra* at 4. As noted previously, the record is silent on what they said to him or what he said to them. *See id.* & n.2. The most the record showed was that in-house lawyers had "some uncertainty" (Tr. 1891) whether the fee was deductible. This is hardly the kind of "clear, not equivocal" evidence of knowledge which this Court has required to establish specific intent. *United States* v. *Ingram, supra,* 360 U.S. at 680 (*quoting Direct Sales Co.* v. *United States, supra,* 319 U.S. at 711).

("a defendant's . . . intent is an element . . . which . . . cannot be taken from the trier of fact through reliance on a legal presumption of wrongful intent from proof of an effect"). The Court of Appeals engaged in precisely the exercise the Court disallowed in *Ingram,* the "piling [of] inference upon inference" to make out a charge of conspiracy. 360 U.S. at 680.

In sum, the conflict engendered by the Second Circuit's decision presents a clear and unencumbered legal issue that commands the Court's supervisory attention. The issue not only involves one of the most-invoked criminal provisions—the conspiracy statute—but substantially affects the burden of proof on the element of specific intent that is common to many criminal statutes. *See, e.g., Anthony* v. *United States, supra* (unlawful interception of wire communications, 18 U.S.C. § 2511); *United States* v. *Bryza, supra* (mail fraud statute, 18 U.S.C. § 1341); *United States* v. *Petersen, supra* (conspiracy to defraud; embezzlement or theft of property of the United States, 18 U.S.C. § 641); *United States* v. *Smith, supra* (Espionage Act, 18 U.S.C. §§ 793 & 794).

There is an additional reason why the Court should intercede in this conflict. The Court of Appeals here did not even pay lip service to, much less heed, this Court's admonition in *Dennis* v. *United States, supra,* 384 U.S. at 860, that conspiracy to defraud prosecutions merit "careful scrutiny." Such scrutiny would not have excused the Government from a central element of its burden of proof. The message of *Dennis,* unfortunately, has become a faint echo in the lower courts. That message should be reinforced by this Court now.

II. THE COURT OF APPEALS IMPROPERLY EXTENDED THE STATUTE OF LIMITATIONS BY ERRONEOUSLY HOLDING THAT THE JURY COULD APPLY TWO SUCH STATUTES TO THE SINGLE CONSPIRACY CHARGED

This Court has repeatedly declared that "criminal limitations statutes are to be liberally interpreted in favor of repose." *United States* v. *Habig,* 390 U.S. 222, 227 (1968); *see also Toussie* v. *United States,* 397 U.S. 112, 115 (1970). Accordingly, when reviewing the application of the various criminal

limitations statutes, the Court has been careful to keep in mind that "Congress has declared a policy that the statute of limitations should not be extended [beyond the five-year period set forth in 18 U.S.C. § 3282] '[e]xcept as otherwise *expressly* provided by law.'" *Toussie, supra,* 397 U.S. at 115 (*citing* 18 U.S.C. § 3282) (emphasis supplied).

Here, the District Court ruled that a single conspiracy charged in a single count could have two statutes of limitations: a five-year statute for the Travel Act objective, and a six-year statute for the conspiracy to defraud objective.[8] The Court of Appeals, in turn, upheld that determination. In requiring the jury to apply different limitations periods to the different objects of the same conspiracy, the Court of Appeals again brought itself into conflict with both logic and precedent.

In *United States* v. *Head,* 641 F.2d 174 (4th Cir. 1981), *cert. denied,* 103 S. Ct. 3113 (1983), the Court of Appeals for the Fourth Circuit considered the precise issue presented below —whether a jury should apply different limitations periods when considering a single conspiracy with multiple objectives. That Court stated:

> "[i]n a multiple-object conspiracy where the object crimes bring into play differing statutes of limitations, the proper course may be to apply the rule of lenity in construing the statutes and apply the shorter limitations period to the entire conspiracy." *Id.* at 178 n.5.

The view expressed by the Fourth Circuit in *Head* is sound. It is consistent with the fundamental proposition that where a conspiracy is charged the "single agreement is the prohibited conspiracy, and however diverse the objects it violates but a single statute." *Braverman* v. *United States,* 317 U.S. 49, 54 (1942).

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[8] Section 3282 of Title 18 prescribes a five-year limitations period for noncapital federal offenses, unless otherwise expressly provided. Section 6531 of Title 26 prescribes a six-year limitations period for specified tax offenses.

Both statutes are reprinted in the Appendix to this Petition.

The Second Circuit's holding, by contrast, seems to follow from the suggestion explicitly rejected by this Court in *Braverman,* " that even though a single agreement was entered into, the conspirators are guilty of as many offenses as the agreement has criminal objects." *Id.* at 53.

Just as the Court in *Braverman* held that there can be but a single penalty imposed for a single conspiracy, *id.* at 54, the Court should now hold that there can be but one statute of limitations applied to one conspiracy. The prescribed statute of limitations represents the legislative determination of when criminal exposure for a particular act should expire. As this Court stated in *Toussie* v. *United States, supra,* " [t]he purpose of a statute of limitations is to limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature has decided to punish by criminal sanctions." 397 U.S. at 114. Under the holding below, exposure to criminal prosecution for the single conspiracy alleged in the indictment is not limited to "a certain fixed period of time," *id.,* but to two different periods of time. The Court of Appeals in essence treated the indictment as if it alleged two distinct criminal acts for which Congress had prescribed two different statutes of limitations. In other words, the holding presupposes two separate conspiratorial agreements, in two different counts, rather than the one agreement in one count that actually was charged in the indictment.

The Court of Appeals, recognizing the inconsistency between its decision and the Fourth Circuit's, minimized the significance of the conflict by characterizing the issue as "metaphysical." (App. 13a.) In fact, the issue is intensely practical, with far-reaching consequences. To apply two different statutes of limitations to one conspiracy, juries must engage in labyrinthine exercises that pose a significant risk of error. Here, for example, the jury had to parse through the overt acts and allocate them to each objective of the conspiracy; to determine for each defendant, applying the varying limitations dates, whether the overt acts allocated to the Travel Act objective or both objectives occurred within five years of the indictment, and whether those allocated to the tax fraud objective or both objectives occurred within six years.

While implying that the jury's task was not difficult, the Court of Appeals itself was unable to perform it correctly. According to the Court, "[t]he last overt act relating to the Travel Act objectives occurred on March 27, 1978; the last overt act relating to fraud on the United States occurred on November 24, 1980." (App. 3a.) In fact, as the Government acknowledged, the last overt act related to the Travel Act charge was the one on November 24, 1980, and the last one relevant to the alleged tax fraud occurred on September 15, 1978.

Furthermore, contrary to the Court of Appeals' suggestion (App. 16a), the special verdict form used here provided little guidance in this exercise, and the jury's confusion was obvious.[9] It deliberated for seven days, asked numerous questions of the trial court about the statute of limitations, ultimately reached no verdict on the bribery objective portion of the charge against Southland, and reached no verdict at all as to one co-defendant.

Thus, the consequence of the Second Circuit's decision will be to complicate dramatically the trial and resolution of many conspiracy cases. The Fourth Circuit's position should prevail; only one statute of limitations should be put before the jury.

Moreover, if only one statute of limitations can apply, it must be the shorter. The rule of lenity in criminal cases, *see United States* v. *Bass*, 404 U.S. 336, 348 (1971), and the statutory policy in favor of repose, endorsed by this Court in *United States* v. *Habig, supra,* and *Toussie* v. *United States, supra,* dictate the application of the five-year limitations period here.

The Government made a calculated choice in drafting the indictment. It opted for the evidentiary and tactical advantages of the vague conspiracy to defraud provision and alleged a single encompassing conspiracy in one count. Having enjoyed these advantages, the Government should not be allowed to evade those consequences of its draftsmanship that are less to its liking.

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[9] The form merely required the jury to specify whether it found Southland guilty of the Travel Act objective, the tax fraud objective, or both. It said nothing about the statute of limitations or the allocation of overt acts between the objectives.

In adopting a position contrary to that of the Fourth Circuit, the Court of Appeals here allowed just such an evasion. It effectively sanctioned what this Court has proscribed, a "prosecutorial sleight of hand to overcome a time bar." *Dennis* v. *United States, supra,* 384 U.S. at 863; *see also Bridges* v. *United States, supra,* 346 U.S. at 223-24. It undermined the policy of repose underlying the statutes of limitations adopted by Congress. And it created additional and unnecessary entanglements in the trial of complex conspiracy cases.

CONCLUSION

For these reasons, Southland's petition for certiorari should be granted.

Respectfully submitted,

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CONCLUSION

For these reasons, Southland's petition for certiorari should be granted.

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THE SOUTHLAND CORPORATION

EDITOR'S NOTE

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 479, 534 — August Term, 1984

(Argued: January 17, 1985 Decided: April 23, 1985)

Docket Nos. 84-1284, -1307

UNITED STATES OF AMERICA,

Appellee,

—against—

THE SOUTHLAND CORPORATION and S. RICHMOND DOLE and EUGENE MASTROPIERI,

Defendants,

THE SOUTHLAND CORPORATION, EUGENE MASTROPIERI,

Defendant-Appellants.

Before:

FEINBERG, *Chief Judge*, FRIENDLY and MANSFIELD, *Circuit Judges.*

Appeal from a judgment of the District Court for the Eastern District of New York, Charles P. Sifton, *Judge*, convicting The Southland Corporation and Eugene Mastropieri under a single count indictment charging these defendants and S. Richmond Dole, a Vice President of Southland, with conspiracy to commit an offense against the United States in violation of 18 U.S.C. § 1952 (the Travel Act) and to defraud the United States by im-

peding the functions of the Internal Revenue Service in the ascertainment and collection of income taxes. Affirmed.

Gerald L. Shargel, New York, New York *for Defendant-Appellant Eugene Mastropieri.*

Peter Bleakley, Washington, D.C. (William J. Baer, Robert N. Weiner, Edward L. Wolf, Arnold & Porter, Washington, D.C.) *for Defendant-Appellant The Southland Corporation.*

Gregory Wallance, Assistant United States Attorney for the Eastern District of New York, Brooklyn, New York (Raymond Dearie, United States Attorney for the Eastern District of New York and Jane Simkin Smith, Assistant United States Attorney), *for Appellee.*

FRIENDLY, *Circuit Judge*:

The Southland Corporation, a large retailer with headquarters in Dallas, Texas, and Eugene Mastropieri, a lawyer in the borough of Queens who was a member of the New York City Council, appeal from judgments of conviction, rendered after trial before Judge Sifton and a jury in the District Court for the Eastern District of New York.[1] The convictions were rendered on a single count superseding indictment, charging a conspiracy in violation of 18 U.S.C. § 371, having two objectives as set

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[1] The jury was unable to reach a verdict with respect to a third defendant, S. Richmond Dole, who was a Vice President of Southland.

forth below. Mastropieri was sentenced to 18 months in prison and Southland to a fine of $10,000.

The indictment began by alleging that there were pending before the Department of Taxation and Finance of the State of New York various cases which concerned Southland's liability for sales taxes due and owing upon the sale of merchandise through 7-Eleven stores franchised by Southland and for other reasons. It proceeded to allege that defendants conspired to travel in foreign and interstate commerce and use facilities in interstate commerce with intent to bribe state officials in violation of Article 200 of the Penal Law of the State of New York in relation to such taxes and had also conspired to defraud the United States by impeding the function of the Internal Revenue Service in determining the true nature of Southland's business expenses by causing amounts intended to be paid as bribes to such officials to appear on Southland's corporation tax return as legal fees to Mastropieri. Various steps in the conspiracy were alleged in further detail. The last overt act relating to the Travel Act objective occurred on March 27, 1978; the last overt act relating to the fraud on the United States occurred on November 24, 1980. Pursuant to a special verdict Mastropieri was found guilty of conspiring to achieve both objectives; Southland was found guilty of conspiring only with respect to the tax fraud objective.

Discussion

I. *Sufficiency of the Evidence*

The jury could reasonably have found the facts to be as follows: Some of Southland's 7-Eleven convenience stores in New York were owned by the corporation; some were franchised. In 1977 Vice President S. Richmond Dole was headquarters executive in charge of all South-

land franchise stores. The stores were divided into regions, each with its own manager. In 1977 the Northern Region Manager was Frank Kitchen. A part of that region, the Northeast Division, which included New York State, was managed by Eugene DeFalco, the Government's principal witness. In 1973 the New York Department of Taxation and Finance began proceedings against 7-Eleven franchise store operators and against Southland itself involving potential liability in excess of $1,000,000, on a legal theory which was by no means implausible. This was a considerable sum for the Northeast Division, which had had only one profitable year in its history. Also, because of bonus arrangements, DeFalco had a direct stake in the Northeast Division's earnings.

In January, 1977, DeFalco was introduced by a corporate security consultant, John Kelly, to defendant Mastropieri, a New York City councilman from Queens. DeFalco reviewed the history of Southland's problems with the Tax Commission. Mastropieri said that he knew a number of people in the sales tax bureau, including the chairman of the Tax Commission, James Tully, that "he could be of service" to DeFalco and that he would later be able to estimate the cost. DeFalco reported the meeting to Dole and to Clark J. Matthews II, Southland's general counsel. In a meeting a week later DeFalco told Mastropieri that he anticipated testifying before a judge in a formal proceeding relating to the tax dispute. Mastropieri interjected that sales tax cases were decided without formal hearings by tax commissioners who were political appointees and their aides who were professionals, and that he was very friendly with both. He explained that it would not be uncommon for the aides to mark the commissioners' agendas at the time of the hearing with indications how they should vote. After repeating that he

had worked with a number of these people, Mastropieri said with a smile, "This may require heavy entertainment;" DeFalco answered "that was possible, we had entertained people before." DeFalco wanted to know what the entertainment would cost but Mastropieri deferred such inquiries.

DeFalco immediately reported to Dole that he and Mastropieri had discussed the case further, and that Mastropieri had told him "in very broad terms who he was going to work with in Albany, the bureaucrats and Mr. [Tully]." DeFalco gave it to Dole as his opinion, based on the dinner conversation, that Mastropieri "was going to be paying somebody off." Dole said, "handle it or can you handle it and take care of it."

Kelly, Mastropieri and DeFalco then sought to come up with suitable financial arrangements. Mastropieri called for $45,000 in cash, of which he was to receive $25,000 "for an up front payment or retainer" and "$20,000 was to be for the expenses that [DeFalco] and he discussed." Dole advised DeFalco that it would be impossible to generate such a large sum in cash within the corporation. A second proposal was to enter into a phony airplane lease arrangement with a friend of Kelly; this ran into difficulties too numerous to be stated. Finally it was proposed that Mastropieri submit a legal bill for $96,500. Since this sum would have to come from the headquarter's accounts, this proposal was discussed, after a large sales meeting for the Northeast Division at the Hilton Hotel at Hartford, Connecticut, in the suite of John P. Thompson, Southland's CEO. The latter inquired about Mastropieri's fee. DeFalco explained it would be in the "90 to $100,000 range" and would include "entertainment." At the mention of this word Dole and DeFalco

chuckled. When Kitchen complained in the hotel corridor as to what was going on, DeFalco gestured to Dole to handle him.

Shortly after the Hartford meeting Dole informed DeFalco that the Mastropieri fee would be paid from a corporate legal accrual account and how the bill should read. On July 7, 1977, Dole left with Eugene Pender, Southland's Controller, an undated bill reading as follows:

EUGENE F. MASTROPIERI
Attorney At Law
67-40 Myrtle Avenue
Glendale, New York 11227

VAndyke 1-2210-1
VAndyke 1-3612-3

Mr. Eugene A. DeFalco
c/o The Southland Corporation
425 Cherry Street
Bedford Hills, New York 10507

FOR PROFESSIONAL SERVICES RENDERED

Balance Due October 1976 thru May 1977 $96,500.00

Dole asked that payment be expedited; when Pender asked why, Dole told him not to pursue that question any further. On the same day a check for $96,500 was made payable to Mastropieri and mailed to DeFalco. Southland took the entire $96,500 as a deductible business expense on its 1977 corporate income tax return. At the same time Southland sent an IRS Form 1099 to Mastropieri informing him that $96,500 was being reported to the IRS as a professional fee.

DeFalco sent the $96,500 check to Kelly with the note reproduced in the margin.[2] Kelly arranged to have Mastropieri call at his home on Sunday, July 17, 1977. Mastropieri brought with him a signed blank check on his firm's escrow account. Kelly handed him the Southland check, which Mastropieri would subsequently deposit in the escrow account. Kelly made the escrow account check payable to himself in the amount of $96,500 and later caused it to be deposited in his account at the Bank of Montreal in Toronto. DeFalco established an account in the same bank into which $20,000 was deposited by intra-bank transfer to serve as a bribery slush fund. By way of numerous checks and wire transfers, an additional $28,500 was siphoned off by DeFalco for his personal use. The $48,000 that remained in Kelly's account was earmarked as Mastropieri's compensation and to cover Kelly's additional tax liability.

Mastropieri had had an inconclusive conference on April 22, 1977 with the state tax officials. In late 1977 Mastropieri asked DeFalco to prepare a draft opinion which the Tax Commission could adopt. DeFalco obliged with an opinion that stated that "[t]here is clear and convincing testimony on the part of Southland to the effect that in no case did it purchase the inventory . . . by repossession," when in fact there was no testimony of any sort, and that "the transfer of the merchandise inventory by the former owners to The Southland Corporation constitutes a transfer in settlement or realization of security

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[2] "25 GM
10 GM (Re invoice/your baby)
13 JK (service fee)
48.5 Back in cash ASAP"
It is not disputed that "GM" means Eugene Mastropieri, JK means John Kelly, and ASAP means "as soon as possible."

interests which are excepted from the general requirements of Article Six of the Uniform Commercial Code and the purposes of Section 1141(c) of the Tax Law."

Events were thus proceeding according to plan when, in early August 1977, high officials of Southland received a letter from senior management announcing the establishment of a Business Ethics Review (BER) program. The cover letter was accompanied by an eight page questionnaire and an explanatory memorandum from Clark J. Matthews II, the general counsel. The questions inquired concerning knowledge of any payments to government officials to settle any disputes including tax disputes, knowledge of any payment to any government official to "grease" or expedite matters, knowledge of the existence of any off-the-book accounts or slush funds, knowledge of any laundering or other recycling of funds, etc. DeFalco called Dole, who had been one of the signers of the covering letter, and asked whether Dole had any problem with any of the questions. Dole answered that he didn't have a problem and asked if DeFalco did. DeFalco responded, "no, I don't have a problem anymore." DeFalco then answered the questions in the negative; Kitchen, after speaking with DeFalco, likewise omitted any mention of the Mastropieri matter. Pender, on the other hand, in responding to the question concerning "grease" payments to public officials, voiced his suspicion "that a payment made in the N/E Stores division to a law firm about July 1977 was inflated to cover costs other than legal fees. Dick Dole should have details."

Responsibility for supervising the BER was placed in Southland's Audit Committee, consisting of three outside directors who generally met once a month in the library of Southland's legal department. At some time during the first half of 1977, Matthews told the Audit Committee

that Dole and DeFalco had approached him to pay a fee to a New York lawyer in the form of an airplane rental lease of $45,000. The Committee rejected this proposal and told Matthews to look into the matter further. As the BER got under way, Matthews took staff attorney Michael Davis on as an assistant for the project and instructed him to add the Mastropieri matter to the list of subjects for inquiry. While in Dallas at a business meeting on October 17 and 18, they interviewed DeFalco and Kitchen but not Pender or Dole.

The DeFalco interview disclosed a history conforming closely to what has been recounted. DeFalco said that part of the Mastropieri fee would be used for the "entertainment" of the Tax Commission members and staff; Davis, who took notes during the interview, later claimed that he understood this to mean "drinks, dinner, that kind of entertainment." There is a dispute whether a note by Davis, "Tully to get", was followed by a word reading "moving" or "money;" the jury could reasonably have found it to be the latter. After the conclusion of the interview Matthews, who was walking with DeFalco and Davis to the parking lot, suggested that maybe he should talk to Mastropieri "to flush out some details;" DeFalco said "I would not touch that with a ten foot pole," explaining—falsely as matters turned out—that "at least five thousand dollars of the payoff had already been made".

The interview with Kitchen produced an admission that he thought a payoff was discussed at the mid-February 1977 meeting at Hartford attended by Dole, Thompson and DeFalco; later he correspondingly amended the answer to his questionnaire. The Audit Committee apparently having instructed Matthews to interview Mastropieri, DeFalco assured the latter that this would

be a charade. Subsequently Matthews advised the Committee that he had spoken to Mastropieri and obtained assurances that there were no irregularities in his representation of Southland. Mastropieri also contributed a letter for Matthews' files stating that his fee arrangement with Southland had been agreed to and paid. Later Matthews wrote a summary of the BER's discoveries in regard to the Mastropieri matters which will be described in Point III below. The final report on the BER, however, made no reference to the Mastropieri matter.

Still Matthews and Davis were understandably concerned that, without some action on their part, the Mastropieri "legal fee" was going to be taken as a deduction on Southland's 1977 income tax return and raised the question of deductibility with the company's outside tax counsel, without, however, stating why they considered that the "fee" might not be a proper deduction. Apparently by accident, an IRS audit team learned of the BER, and requested a copy of the report and the underlying questionnaires. Matthews met with Davis and gave him a short list of names of persons whose answers to questionnaires should not be given to the IRS; the list included Pender and Kitchen. These questionnaires were withheld although the IRS agents were falsely assured they had been given all questionnaires with positive responses.

The final piece of evidence worth recounting concerned a conversation between DeFalco and Dole in November 1980, two months after DeFalco had been promoted to a vice presidency and assigned to the Dallas headquarters. Dole, who had become aware of the FBI's investigation of the Mastropieri fee and thought the bribe had been paid, called DeFalco and instructed him

not to reveal the existence of the bribery scheme. During the course of the conversation, DeFalco wrote down on the back of an office telephone message slip:

> 11-24
>
> Dole called —
>
> Blood oath on N.Y. deal
>
> Hang together or we all can get into trouble.

In light of the facts which the jury was entitled to find, appellants' arguments with respect to insufficiency, including the argument that the coconspirators did not know that "heavy entertainment" could include bribery, border on the frivolous. The only ones even deserving mention are some of Southland's more particularized arguments. One of those is that the Government failed adequately to demonstrate that Southland was aware of 26 U.S.C. § 162(c) which forbids deduction of a bribe in determining net income. Ignorance of the law is no defense to a charge of purposeful and intentional action. *United States* v. *Gregg*, 612 F.2d 43, 51 (2 Cir. 1979). Furthermore, the indictment did not turn on 26 U.S.C. § 162(c); the charge was conspiring to defraud the United States by obstructing the IRS in performing the function of determining Southland's allowable deductions, and it is absurd to suppose that the Southland officials concerned with the Mastropieri matter did not know that deductions may be taken only for "ordinary and necessary" business expenses, 26 U.S.C. § 162(a), and that a bribe is not such an expense. Finally, there was evidence that Dole, DeFalco, Matthews and Davis were all very much concerned that the $96,500 payment was being improperly taken as a deduction.

A shade more needs to be said in regard to Southland's contention that the Government proved only an intent to deprive the State of New York of a fair hearing with respect to Southland's New York sales taxes rather than an intent to deprive the United States of income tax. It may well be true that when DeFalco began his relationship with Mastropieri, defrauding the United States was not in his mind. However, it was not too long before the conspirators became aware that the means chosen to conceal the payment of the intended bribe, a $96,500 legal fee, was almost certain to find its way into the deductions in Southland's 1977 income tax return. This is evidenced by the sending of the Form 1099 to Mastropieri, as well as much other conduct related heretofore and hereafter. If the Southland officials had wished to avoid defrauding the United States, they needed only to advise Southland's Treasurer that the $96,500 deduction for legal fees should not have been taken and that an amended return omitting this deduction should be filed. Section 371 has often been applied to reach conduct intended to defraud the United States, although the original activity was aimed at quite different objectives. A good example is *United States* v. *Parker*, 469 F.2d 884, 895-96 (10 Cir. 1972). There the defendants made Molotov cocktails and other bombs to burn buildings belonging to their competitors and enemies. The court upheld their conviction under § 371 for conspiring to defraud the United States because they did not pay the required taxes on the explosive devices. Where defendants are shown to have intended to defraud the United States, they cannot escape liability by showing that this intent was merely incidental to some other action which constituted their primary motivation. *See United States* v. *Barker*, 546 F.2d 940, 945 (D.C. Cir. 1976) (Wilkey, J., concurring).

II. *The Dual Statute of Limitations Instruction*

Judge Sifton charged the jury that a conspiracy to violate the Travel Act has a five year statute of limitations, *see* 18 U.S.C. § 3282. He further instructed that, in the language of 26 U.S.C. § 6531(1), the period of limitations is six years for "offenses arising under the internal revenue laws" and "involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not." Hence, in order to convict under the portion of the indictment charging a conspiracy to violate the Travel Act the jury had to find an overt act within five years of the return of the indictment but to convict under the portion of the indictment charging a conspiracy to defraud the United States, it needed to find only an overt act within six years.

On its face the charge seems to be precisely what the statutes require. Clearly this is what the judge would have had to instruct if the indictment had contained two conspiracy counts instead of one. In opposition, appellants urge a somewhat metaphysical argument that since the indictment charges only one crime, there can be only one applicable period of limitations, just as there can be only one punishment, *see Braverman* v. *United States*, 317 U.S. 49, 53-54 (1942). Whatever the philosophical merits of the argument may or may not be, we fail to see a good sense basis for it. If the Government adduced sufficient evidence to convince the jury that Southland conspired to defraud it within the six year period provided by 26 U.S.C. § 6531(1), as we have held that it did, we do not see why it should be deprived of a conviction for this violation of 18 U.S.C. § 371 because it failed to establish to the jury's satisfaction that Southland also engaged, during a five year period antedating the indictment, in a con-

spiracy to violate the Travel Act. Even more clearly, if the Government established to the jury's satisfaction that Mastropieri had engaged in a conspiracy to violate the Travel Act within five years and to defraud the United States within six, we cannot see what is wrong in his being convicted for a conspiracy with both objectives. Any danger of jury confusion was eliminated by the taking of special verdicts as to each object. If the Government had failed to present sufficient substantive evidence to warrant submission of the Travel Act objective to the jury but did meet its burden with respect to the fraud objective and the jury convicted, defendants would surely not have been entitled to have the indictment dismissed. *See United States* v. *James*, 528 F.2d 999, 1014 (5 Cir.), *cert. denied*, 429 U.S. 959 (1976). We fail to perceive how their case stands better because the Government did present sufficient evidence to send to the jury the case with respect to both defendants and both objectives.

So far as the authorities are concerned, neither *United States* v. *Cunningham*, 723 F.2d 217 (2 Cir. 1983), *cert. denied*, 104 S. Ct. 2154 (1984), nor *United States* v. *Fruehauf Corp.*, 577 F.2d 1038, 1069-70 (6 Cir.), *cert. denied*, 439 U.S. 953 (1978), gives the defendants the support that is claimed. On the other hand, *United States* v. *Albanese*, 123 F. Supp. 732 (S.D.N.Y. 1954), *aff'd*, 224 F.2d 879 (2 Cir.), *cert. denied*, 350 U.S. 845 (1950), does not give the Government all the support for which it contends. This leaves us with *United States* v. *Head*, 641 F.2d 174 (4 Cir. 1981), *cert. denied*, 103 S. Ct. 3113 (1983). The actual holding in that case was simply that where an indictment alleged a conspiracy with three unlawful objects, two of them carrying a five and one a six year period of limitations, and a question of limitations had been raised with respect to the former, it was error

for the court to have instructed merely that it was enough for the Government to have proved that the defendant had conspired to violate one of the three statutes. Since the jury was asked only to render a general verdict, this created the possibility of a conviction solely as to objects subject to the five year statute although no act occurred within that period. After this clearly correct holding, the court added in an unnecessary footnote:

> The government contends that a five-year period applies only to a conspiracy to violate the bribery laws while a six-year period would apply to a conspiracy with tax objects. . . . While this may be true, we are not convinced that this difference would require the "hybrid" statute of limitations charge suggested by the government. In a multiple-object conspiracy where the object crimes bring into play differing statutes of limitations, the proper course may be to apply the rule of lenity in construing the statutes and apply the shorter limitations period to the entire conspiracy.

641 F.2d at 178 n.5. Apart from the fact that all this was dictum, the court did not commit itself; it said only that "[i]n a multiple-object conspiracy where the object crimes bring into play different statutes of limitations, the proper course *may be* to apply the rule of lenity in construing the statutes and apply the shorter limitations period to the entire conspiracy." *Id.* (emphasis supplied). On further reflection the court might well have decided otherwise. In the first place the rule of lenity operates only where there is a fair basis for the construction urged by the defense, *see, e.g., Callanan* v. *United States*, 364 U.S. 587, 596 (1961); *United States* v. *Moore*, 613 F.2d 1029, 1043-45 (D.C. Cir. 1979); here we see none. Beyond that, as we have said before, we perceive no basis

for invoking a rule of lenity in favor of defendants who have been proved to have conspired to take action condemned by 18 U.S.C. § 371 within the six year time limit provided by 26 U.S.C. § 6531(1) simply because they also have, or have not, been proved to be guilty of conspiracy to violate other statutes to which a five year period of limitations applies.

We hold that in this case, where special verdicts were taken, the dual statute of limitations instruction was proper.

III. *Matthews' Notes*

Early in the trial the Government offered in evidence notes prepared by Southland's general counsel, Clark Matthews, which we quote in the margin.[3] This was the last of four yellow sheets found in a binder used by Southland's Legal Department to collect information discovered during the BER. The first three pages are an outline entitled "BER-Final Report to Board"; the only reference in these pages to the Mastropieri matter was "NY-Mastropieri Div Mg Thought Payment Outside Usual Controls." The final BER report made no reference to the Mastropieri matter, although Matthews then knew the scheme involved a bribery. The Government

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[3]

NY Tax Comm-X
—300m
Since 10/11/72 50 pending sales tax term franchisees contend fc sec int
10/76-5/77 paid 7/7/77
abt 200 stores
Kelly $107,757.92 phase out—take care of
(camera) for $40M to spread among mems tax comm
(mtn & sec film kit)
Mastropieri

urged that the quoted note represented Matthews' real understanding of what had gone on. Judge Sifton initially declined to allow the note to be admitted, on the ground that "the portions of these notes relied on by the government are so cryptic that it seems to be speculative to attribute to these notes the meaning which the government argues they have" and that Matthews, the only witness who could explain the notes, intended to claim his Fifth Amendment privilege and would thus be unavailable. Upon urging by the Government, the court reexamined the issue but adhered to its decision. However, after Southland had completed its evidence and the last witness of the trial was on the stand, the judge announced that his views about the Matthews note had changed and admitted the entire exhibit. Southland objects that the note was speculative; that it was inadmissible hearsay; and that its admission violated the corporation's confrontation rights under the Sixth Amendment.

FRE 402 prescribes that, subject to certain exceptions not here material, "[a]ll relevant evidence is admissible," but FRE 403 provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed" by certain dangers there outlined, a balancing which Judge Sifton here expressly resolved in favor of probative value. FRE 401 says that relevant evidence means:

> evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

As said in *Carter* v. *Hewitt*, 617 F.2d 961, 966 (3 Cir. 1980), the "standard of relevance established by the Federal Rules of Evidence is not high." Particular de-

ference is properly accorded to a ruling of the trial judge with respect to relevancy. *See e.g., United States* v. *Catalano*, 491 F.2d 268, 273 (2 Cir.), *cert. denied*, 419 U.S. 825 (1974); *United States* v. *Aulet*, 618 F.2d 182, 191 (2 Cir. 1980). He has a familiarity with the development of the evidence and the jury's reaction to it which an appellate court cannot equal. *See United States* v. *Robinson*, 560 F.2d 507, 514-15 (2 Cir. 1977) (en banc), *cert. denied*, 435 U.S. 905 (1978). Hence courts of appeals have sustained rulings admitting evidence quite as equivocal as Matthews' notes, *see, e.g., Tug Raven* v. *Trexler*, 419 F.2d 536, 543 (4 Cir. 1969), *cert. denied*, 398 U.S. 938 (1970) (suicide by one member of crew of tug after fire admitted as possibly showing consciousness of guilt); *Carter* v. *Hewitt*, *supra*, 617 F.2d at 966 (letter by plaintiff encouraging filing of brutality complaints against prison guards admitted because it could be read as encouraging filing of false complaints of which plaintiff's was one). We have also ruled that great deference must be given to the trial judge's weighing under Rule 403. *See United States* v. *Robinson*, *supra*, 560 F.2d at 514-15.

The reasonableness of concluding that the Matthews notes revealed his knowledge of the true nature of the Mastropieri transaction had become much greater at the end of trial when the jury had learned that Matthews had interviewed DeFalco and had been told that Mastropieri had originally sought $40,000 to $50,000 in cash, that Matthews had also been approached to approve the payment of a $45,000 legal fee to Mastropieri in the form of a phony airplane lease, and that Matthews had been told by DeFalco not to interview Mastropieri because a bribe had already been paid. Judge Sifton's change in his ruling thus did not reflect capriciousness, as Southland's

counsel suggests, but a reasoned reaction to changed circumstances.

Responding to the hearsay objection the Government asserts that the notes were admissible either because they were not hearsay, *see* Rules 801(d)(2)(D) (vicarious admissions), 801(c) (statement not offered to prove the truth of the matter asserted), 801(d)(2)(E) (statement by coconspirator during the course and in furtherance of the conspiracy), or under the exception in Rule 803(3) (statement of declarant's existing state of mind). Judge Sifton predicated admissibility on Rule 801(c). He directed the jury that "[t]he Matthews notes were . . . admitted solely as bearing on their purported author's state of mind." Matthews' belief that a bribery had been planned was unquestionably relevant. If he knew that the Mastropieri transaction involved a bribe, this would tend to show that a number of his actions, and hence those of Southland, *see United States* v. *Dotterweich*, 320 U.S. 277, 281 (1943), *e.g.*, the failure to interview Pender, the withholding from the IRS of the Pender and Kitchen questionnaires, the perfunctory nature of the interview of Mastropieri and the report to the Audit Committee in regard to the same, the mockery of the discussion with outside tax counsel, the failure to disclose to the Audit Committee what Matthews thought was a $5000 payment on the bribe, were in furtherance of a conspiracy to obstruct the IRS in the performance of its functions.

When a declaration is admitted only to prove a relevant state of mind, it does not appear to matter, save perhaps as later indicated, whether admissibility is predicated on the declaration not being hearsay because it was not offered to prove the truth of the matter asserted, FRE 801(c), or under the hearsay exception for declara-

tion of states of mind, FRE 803(3). Under either theory, "[a] state of mind can be proved circumstantially by statements . . . which are not intended to assert the truth of the fact being proved," *see* 4 Weinstein, Evidence ¶ 803(3)[02], at 803-107 (1984). *See also Metzler* v. *United States*, 64 F.2d 203, 208 (9 Cir. 1933) (letter from private detective to district attorney that county sheriff appointed by him was accepting protection money admissible to show district attorney's knowledge); *United States* v. *De Carlo*, 458 F.2d 358, 363-64 (3 Cir.) (en banc), *cert. denied*, 409 U.S. 843 (1972); *United States* v. *Taglione*, 546 F.2d 194, 200-01 (5 Cir. 1977); *Mills* v. *Danson Oil Corp.*, 691 F.2d 715 (5 Cir. 1982). We thus reject appellants' hearsay argument.[4]

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[4] Although it is not necessary to decide the point, we would not wish to be understood as foreclosing the Government's argument that the Matthews notes were outside the hearsay rule, and thus admissible against Southland, under FRE 801(d)(2)(D) as "a statement by [an] agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship." The appellants contend that *Litton Systems, Inc.* v. *American Tel. & Tel. Co.*, 700 F.2d 785, 816-17 (2 Cir. 1983), *cert. denied*, 104 S. Ct. 984 (1984), requires that the author of the admission have personal knowledge, apparently meaning knowledge from non-hearsay sources. We do not read the *Litton* opinion as going so far. The material excluded in *Litton* was merely notes of employee interviews; the opinion describes them as containing "multiple levels of hearsay" and refers to the recorded material as "gossip," citing 4 Weinstein, Evidence ¶ 801(d)(2), at 801-164 (1981). Here Matthews had obtained knowledge of the questionable nature of the Mastropieri fee in his capacity as general counsel before his assignment to the BER. Moreover, the *Litton* opinion does not cite the statement in the Advisory Committee's Notes:

> The freedom which admissions have enjoyed from . . . the restrictive influences of the opinion rule and the rule requiring firsthand knowledge, when taken with the apparently prevalent satisfaction with the results, call for generous treatment of this avenue of admissibility.

FRE 801(d)(2)(D) advisory committee note. The only case cited in *Litton* on this point, *Northern Oil Co.* v. *Socony Mobil Oil Co.*,

[Footnote continued on following page]

We come finally to appellants' objection based on the Confrontation Clause. *See California* v. *Green*, 399 U.S. 149 (1970); *Dutton* v. *Evans*, 400 U.S. 74 (1970); *Ohio* v. *Roberts*, 448 U.S. 56 (1980). It is not at all clear that the constitutional impediment against the receipt of extra-judicial declarations, whether within or, as in *Dutton*, without recognized exceptions to the hearsay rule, applies to a declaration which is not being used as proof of the fact stated, *see Dutton* v. *Evans*, *supra*, 400 U.S. at 88 (plurality opinion). The contention likewise seems hardly appropriate when voiced by Southland, since the witness it wishes to confront is, in the eyes of the law, itself. *United States* v. *Dotterweich*, *supra*, 320 U.S. at 281. However, assuming that both defendants are entitled to raise objection under the Confrontation Clause, we think Matthews' notes had sufficient assurances of reliability, particularly when they were received only as proof of his belief that a bribery had been planned. *Dutton* v. *Evans*, *supra*, 400 U.S. at 88-89. Matthews had no motive to make unfair accusations against anyone; to the contrary, his own involvement in the Mastropieri scheme and his concealment of facts from the Audit Committee gave him every inducement not to memorialize his beliefs unless he thought them true. Indeed the notes were later used

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[Footnote continued from previous page]

347 F.2d 81, 83 (2 Cir. 1965), antedates the Rules, and the Third Circuit has thought it to be "clear from the Advisory Committee Notes that the drafters intended that the personal knowledge foundation requirement of Rule 602 should apply to hearsay statements admissible as exceptions under Rules 803 and 804 but not to admissions (including coconspirator statements) admissible under Rule 801(d)(2)." *United States* v. *Ammar*, 714 F.2d 238, 254, *cert. denied*, 104 S. Ct. 344 (1983) (footnote omitted). The Seventh and Eighth Circuits agree; *see Mahlandt* v. *Wild Canid Survival & Research Center*, 588 F.2d 626 (8 Cir. 1978); *MCI Communications* v. *American Tel. & Tel. Co.*, 708 F.2d 1081, 1143 (7 Cir.), *cert. denied*, 104 S. Ct. 234 (1983). Reconciliation of Rule 801(d)(2)(D) and Rule 602 should await a case where this is essential.

as a basis for prosecuting Matthews for conspiracy to defraud the Government. *United States* v. *Matthews*, No. Cr. 84-00461 (E.D.N.Y. 1985). Matthews' contact with the Mastropieri matter both as it transpired and in the course of the BER gave him considerable firsthand knowledge of the planned bribe. DeFalco's testimony, which was subject to cross-examination, corroborated Matthews' notes in many respects. *Cf. United States* v. *Wright*, 588 F.2d 31, 38 (2 Cir. 1978), *cert. denied*, 440 U.S. 917 (1979). Furthermore the notes were neither "crucial" to the Government's case nor "devastating" to the defense. *See Dutton* v. *Evans*, *supra*, 400 U.S. at 87. They dealt primarily with the bribery objective; the jury reached no verdict on this as respects Southland and the other evidence with respect to Mastropieri was overwhelming, at least unless the jury must be supposed to have been so gullible as not to understand what was meant by "heavy entertaining."

IV. *The Exclusion of a Portion of Mastropieri's Grand Jury Testimony, and herein of the Sealing of the Indictment*

After having brought out the fact of Mastropieri's receipt of IRS Form 1099 in relation to the legal bill for $96,500, the Government introduced an excerpt from his grand jury testimony reading as follows:

> Q: As a result of receiving this [Form] 1099, Grand Jury Exhibit 18, did you know that the Southland Corporation was reporting the fact that you had received a fee of $96,500?
>
> A. Yes.

However, the court refused to allow Mastropieri to introduce testimony immediately following this. After admit-

ting his realization that Southland would be deducting the $96,500 as a legal fee, Mastropieri said that he had called DeFalco and complained about Southland's reporting the $96,500 as income to him when it knew that he had not actually received any funds. According to Mastropieri, DeFalco said that he would "take care of the matter" and that Mastropieri shouldn't worry about it. Mastropieri said he was not going to report "one cent of this $96,500" and thought DeFalco had said it was a mistake—"I should not have gotten this thing." Mastropieri contends that this testimony might have led the jury to conclude that he had taken steps which he could have expected would lead Southland not to have taken the deduction, thereby negating any intent on his part to defraud the Government.

FRE 106 provides that:

> When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

We have interpreted this rule "to require that a statement must be admitted in its entirety when this is necessary to explain the admitted portion, to place it in context, or to avoid misleading the trier of fact . . . or to ensure a 'fair and impartial understanding' of the admitted portion." *United States* v. *Marin*, 669 F.2d 73, 84 (2 Cir. 1982). This is a principle of simple fairness, long antedating the Federal Rules of Evidence, *see United States* v. *Stone*, 282 F.2d 547, 551-52 (2 Cir.), *cert. denied*, 364 U.S. 928 (1960) (also involving refusal to admit a portion of a defendant's grand jury testimony).

The district judge was in error in relying on *Marin* as a basis for exclusion; there the excluded portion related to a subject that had been excised from the statement that was admitted and that was "neither explanatory of nor relevant to the admitted passages", *see also* 669 F.2d at 85 n.6. There is nothing in the Government's point that a part of the excluded testimony was favorable to it; Mastropieri still may rightfully complain of the exclusion of the parts that were not.

This, however, does not lead us to reverse the appellants' convictions. Excluding these portions of Mastropieri's grand jury testimony had no effect upon Southland. Even as to Mastropieri, the excluded portion of the testimony bore only on the fraud objective; it had no probative effect with respect to Mastropieri's guilt for conspiracy to violate the Travel Act. Were it not for a question concerning the running of the statute of limitations on the Travel Act objective discussed below, this would end the matter as Mastropieri's conviction could be upheld so long as he agreed to accomplish at least one of the criminal objectives charged. *United States* v. *Papadakis*, 510 F.2d 287, 297 (2 Cir. 1975). Despite the limitations question, we still rule in the Government's favor since although the limitations point is of first impression in this court, we think the Government is correct. We therefore need not consider the Government's alternative argument that the exclusion of portions of Mastropieri's grand jury testimony was harmless error even in respect of the fraud charge.

The statute of limitations point is this: Mastropieri claims, and the Government does not dispute, that the last overt act charged against him in the bribery part of the conspiracy occurred on March 27, 1978. The predecessor of the instant indictment was returned by the grand

jury on March 25, 1983. However, the Government obtained an order sealing the indictment; the basis for this was that announcement of the indictment would make it more difficult for the Government to obtain complete and truthful testimony from Frank Kitchen, a vice president of Southland who had been granted immunity, *see Matter of Kitchen*, 706 F.2d 1266 (2 Cir. 1983). After this court's decision on April 27, 1983 made it evident to the Government that no purpose would be served by recalling Kitchen before the grand jury, the indictment was unsealed on May 5, 1983. Judge Sifton found that the sealing, for a period of six weeks, lasted no longer than was necessary to accommodate legitimate prosecutorial interests. Mastropieri contends that there was no legal basis for the ruling and that May 5, 1983 must be taken as the date of the return of the indictment, thus barring prosecution for conspiracy to violate the Travel Act. He relies on two reasons. One is that under F.R. Cr. P. 6(e)(4) an indictment may be sealed only to assist in achieving custody of the defendant; the other is that if sealing is permitted for any other purpose, there was no proper purpose here.

Under both 18 U.S.C. § 3282 and 26 U.S.C. § 6531, the indictment must be "found" within the statutory periods. Read literally this does not require that the indictment must be made public. However, F.R. Crim. P. 6(e)(4) provides:

> Sealed Indictments. The federal magistrate to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. Thereupon the clerk shall seal the indictment and no person shall disclose the return of the indictment except

> when necessary for the issuance and execution of a warrant or summons.

Mastropieri insists that no reason except the one mentioned in the Rule can justify the sealing of an indictment.

There is a surprising dearth of authority upon the subject. In *United States* v. *Michael*, 180 F.2d 55, 57 (3 Cir. 1949), *cert. denied sub nom. United States* v. *Knight*, 339 U.S. 978 (1950), decided only three years after the Criminal Rules were adopted, the court stated in an opinion by Judge Maris:

> Criminal Procedure Rule 6(e) authorizes indictments to be kept secret during the time required to take the defendant into custody. If such secrecy may lawfully be imposed in that situation we see nothing unlawful in the court imposing secrecy in other circumstances which in the exercise of a sound discretion it finds call for such action.

(footnote omitted). The court would scarcely have said this if the taking of custody had been the sole objective.[5]

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[5] Examination of the briefs in the Third Circuit tend to confirm this. While, in their statements of fact, the parties merely note the sealing of the indictment without providing relevant details, the appellants stated in a Supplemental Brief on Reargument:

> The docket entry discloses no reason for the impoundment [of the indictment]. One thing, however, is certain. It was not for the purpose of facilitating the apprehension of the accused. . . . Why the indictment was thus arbitrarily and indefinitely impounded must remain a matter of conjecture.

This statement that custody could not have been the purpose for the sealing is further supported by the fact that the defendants were reputable members of the Pittsburg business community and do not appear to have been the type of individuals who would have gone "underground" to evade capture by the authorities; when the presiding judge unsealed the indictment, he refused the United States Attorney's request that bench warrants be issued for the defendants and directed that the accused be notified by letter or telephone to appear for arraignment.

The notes of the Advisory Committee written when Rule 6(e) was adopted in 1946 say cryptically that "[t]he . . . sentence authorizing the court to seal indictments continues present practice." Such evidence as we have found suggests that the practice at the time the Rule was written allowed courts to seal indictments for reasons other than obtaining custody of the defendants. A treatise of the period, which described itself as focusing on "what is and not what has been or should be," reflects this in its statement that "[*w*]*here the public interest requires it, or for other sufficient reason*, the court may order an indictment to be sealed." Housel & Walser, *Defending and Prosecuting Federal Criminal Cases* § 230, at 300 (2d ed. 1946) (emphasis supplied). *Accord* 1 Matthews, *How to Try a Federal Criminal Case* § 215, at 318-19 (1960). At a symposium on the new Rules of Criminal Procedure sponsored by the New York University School of Law in collaboration with the American Bar Association, the New York State Bar Association and the Federal Bar Association, George Medalie—Associate Judge of the New York Court of Appeals, former United States Attorney for the Southern District of New York, and member of the Supreme Court Advisory Committee on the Criminal Rules—stated before a panel chaired by Judge Learned Hand, that Rule 6 contained:

> the usual provision for the sealing of the indictment, where the district attorney or the attorney general is of the opinion that the indictment having been procured, *for sound reasons of policy*, nothing should be done for a while, no publication made of the fact. That, of course, is present practice.

VI *Proceedings of the New York University Law School Institute on the Federal Rules of Criminal Procedure* 155 (1946) (emphasis supplied). Further support for this

view comes from comments received by the Supreme Court's Advisory Committee after circulation of its initial draft of the Rules.* For example, one attorney wrote the Committee to complain about "the increasing practice of using sealed indictments where it was unnecessary." 1 Orfield, *Criminal Procedure Under the Federal Rules* § 6:2, at 348 (1966). Another attorney proposed that the Rules contain "a provision prohibiting secret or sealed indictments as to defendants already subject to the jurisdiction of the court." *Id.*

If, as we are therefore confident, the practice before adoption of the Rule permitted the sealing of indictments for reasons other than obtaining custody, we do not believe the intention was to restrict it. The Federal Rules of Criminal Procedure were not intended to be exhaustive. As a member of the Supreme Court Advisory Committee stated at the time, "many now accepted practices and judicial powers are omitted from the proposed Rules without intent that the omission shall be considered by implication a repeal thereof." Waite, *The Proposed Federal Rules of Criminal Procedure*, 27 J. Am. Jur. Soc. 101 (1943). If the Rule were read literally, a defendant who was subject to arrest on the return of the indictment could object to a sealing to facilitate the arrest of codefendants; yet the Rule has never been read that way. *See United States* v. *Watson*, 599 F.2d 1149, 1155 (2 Cir. 1979), *rev'd on other grounds sub nom. United States*

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* The preliminary draft of Rule 6 of Federal Criminal Procedure provided that:

> The court may direct that the indictment shall be kept secret until the defendant is in custody or has given bail and the clerk shall seal the indictment and in that event no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons.

Except for minor stylistic revisions, this language is identical to that in the Rule which was eventually adopted.

v. *Muse*, 633 F.2d 1041 (2 Cir. 1980) (en banc), *cert. denied*, 450 U.S. 984 (1981). The limiting effect of the Rule was to place sealing in the hands of a judicial officer rather than as theretofore in those of a prosecutor. 1 Orfield, *Criminal Procedure Under the Federal Rules*, *supra*, § 6:1, at 341. In sum, we see no reason for disagreeing with the *Michael* decision, rendered only three years after adoption of the Rule, a time when the intention of the framers was far better known that it now can be.

The question remains whether the prosecutorial objectives here sought to be obtained justified the sealing of the indictment. This is a point on which great deference should be accorded to the discretion of the magistrate, at least in the absence of any evidence of substantial prejudice to the defendant. The Government should be able, except in the most extraordinary cases, to rely on that decision rather than risk dismissal of an indictment, the sealing of which it might have been willing to forego, because an appellate court sees things differently, after the expenditure of vast resources at a trial and at a time when reindictment is by hypothesis impossible. Mastropieri has not even asserted prejudice from the sealing of the indictment for 39 days after the statute had run. Obviously he had been on notice of the likelihood of indictment and could have begun his preparation for trial long before the end of the statutory period, *see United States* v. *Watson*, *supra*, 599 F.2d at 1154.

V. *Mastropieri's Argument that the Government Forfeited its Right to Prosecute by Failing to Indict him on or before September 30, 1982*

An argument which can be dealt with much more swiftly is one made by Mastropieri that the Government

forfeited its right to prosecute him by an agreement made on July 22, 1982. This reads in pertinent part:

> Eugene Mastropieri hereby waives and shall not assert the defense that any prosecution for any crime incident to the retention by and representation of the Southland Corporation by Eugene Mastropieri is barred by the statute of limitations, provided that any such prosecution shall be brought on or before September 30, 1982.

The background of the agreement was this: The Government feared in the summer of 1982 that it might be having limitations problems with respect to Mastropieri [7] but the latter wished to appear before the grand jury to present his side of the case. The Government was willing to accommodate him provided he would waive any statute of limitations defense if an indictment was brought on or before September 30, 1982. When it became clear that the grand jury would not finish its deliberations by that date, the Government sought a further waiver which Mastropieri declined to give.

After the indictment returned on March 25, 1983, was unsealed, Mastropieri moved to dismiss it on the basis of his waiver. The district judge denied this, saying that "the defendant is not so clearly right in his argument . . . that the issue can be decided on a motion to dismiss." Characterizing this as a "factual finding of ambiguity by the trial court," and citing numerous inapposite decisions, Mastropieri asks that we dismiss the

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[7] The Government had similar concerns as regards Southland, and the corporation executed an identically worded waiver on the same date as Mastropieri. At the Government's request, Southland subsequently extended its waiver through May 5, 1983, the date of the expiration of the term of the grand jury investigating the matter.

indictment because the Government breached a promise to indict him on or before September 30, 1982, if at all.

We see no force whatever in this argument. Mastropieri made a limited waiver of the statute of limitations; the Government did not promise anything. It is not asserting that Mastropieri has waived his right to contend that the indictment was found too late. He makes no contention that the indictment was not timely "found". Although Mastropieri argues that it would have been untimely if we should determine that the date of unsealing rather than the date of finding controls, the Government, while disputing the argument, does not challenge his right to make it. Judge Sifton made no "finding" that the agreement meant what Mastropieri said. No legal consequences arise from his having denied Mastropieri's motion on the ground that Mastropieri was not clearly right rather than, as we would have done, on the ground that he was clearly wrong.

VI. *Refusal to Charge a Violation of 26 U.S.C. § 7207 as a Lesser Included Offense*

Section 7207 of the IRC provides:

> Any person who willfully delivers or discloses to the Secretary any list, return, account, statement, or other document, known by him to be fraudulent or to be false as to any material matter, shall be fined not more than $10,000 ($50,000 in the case of a corporation), or imprisoned not more than 1 year, or both.

This crime being a misdemeanor, under 18 U.S.C. § 371 conspiracy to commit it likewise is a misdemeanor. The judge denied defendants' requests to charge that if the

jury did not find that they had committed the felony of conspiring to defraud the United States by impeding the functioning of the IRS, it might nevertheless find that defendants conspired to violate § 7207.

We have held that a defendant is entitled to a lesser included offense instruction if:

> (1) all of the elements of the lesser offense (§ 7207) were also elements of the greater offense (§ 371), *see United States* v. *Giampino*, 680 F.2d 898 (2 Cir. 1982), and,
>
> (2) the greater offense has one additional element not found in the lesser offense that the jury would be justified in finding the government had failed to prove beyond a reasonable doubt. *United States* v. *Garcia-Duarte*, 718 F.2d 42 (2 Cir. 1983).

There is no dispute that the first condition was met; the elements of a conspiracy to file a return known to the maker to be fraudulent or false as to any material matter (§ 7207) would also constitute elements of a conspiracy to defraud the United States by impeding the functioning of the IRS. The debated question relates to the second condition, which the Government contends was absent.

The Court said in *Sansone* v. *United States*, 380 U.S. 343, 350 (1965):

> A lesser-included offense instruction is only proper where the charged greater offense requires the jury to find a disputed factual element which is not required for conviction of the lesser-included offense.

In *Keeble* v. *United States*, 412 U.S. 203, 208 (1973), the Court phrased the test as being whether "the evidence would permit a jury rationally to find [the defendant]

guilty of the lesser offense and acquit him of the greater." *See also United States* v. *Markis*, 352 F.2d 860, 865-67 (2 Cir. 1965), *vacated on other grounds*, 387 U.S. 425 (1967).

We fail to see what this additional element would be. Once the jury decided that Southland had filed a return taking a deduction for legal expenses which it knew had not been incurred, as the jury would have had to do in order to find a violation of 26 U.S.C. § 7207, it would have decided every element necessary to convict Southland of defrauding the United States under 18 U.S.C. § 371. This is particularly clear in light of *United States* v. *Bishop*, 412 U.S. 346 (1973), which held that § 7207 requires proof of the same degree of *scienter* as criminal tax felony statutes using the adverb "willfully", and consequently reversed the Court of Appeals for the Ninth Circuit which had reversed a district court for refusing to give lesser included offense instructions in a case where the defendant had been charged with violating 26 U.S.C. § 7206. If, as held in *Bishop*, 412 U.S. at 360-61, a conviction of defendants for violating § 7207 would have required proof of "bad purpose or evil motive" in the sense described in *United States* v. *Murdock*, 290 U.S. 389, 394-95 (1933), no more is needed to establish the "intent to defraud" required by § 371.

Defendants argue that the jury could have found that they agreed purposefully to file a false tax return in violation of § 7207, without finding that they intended to defraud the United States of revenue. Even if such a finding by the jury were possible, it is of no aid to the defendants. The Government need not prove that the defendants intended to defraud the United States of revenue to establish a violation of § 371. Conspiracy to

defraud the United States includes attempts to "interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest. It is not necessary that the Government shall be subjected to property or pecuniary loss by the fraud, but only that its legitimate official action and purpose shall be defeated by misrepresentation . . . ." *Hammerschmidt* v. *United States*, 265 U.S. 182, 188 (1924). Accordingly, once the jury determined that the defendants violated § 7207 by deliberately filing a false tax return, it would also have decided that they conspired in violation of § 371 to defraud the United States by interfering with the lawful function of the IRS in ascertaining Southland's legitimate tax deductions.

Defendants argue that the indictment charged not broadly that they conspired to defraud the United States, which is all that the statute requires, but that they agreed that the defrauding should be accomplished "by impeding, obstructing and defeating the lawful functions of the Internal Revenue Service of the Treasury Department of the United States in the ascertainment, computation, assessment and collection of income taxes, to wit: by conducting their business affairs and financial transactions in a manner which would prevent the Internal Revenue Service from ascertaining the true and correct nature of business expense deductions . . . ." But the means by which defendants did this was the filing of a return which took a $96,500 deduction for legal fees to which the defendants knew the corporation was not entitled. This is precisely what the Government would have to prove to establish a conspiracy to violate § 7207. We see nothing to the contrary in *United States* v. *Tarnopol*, 561 F.2d 466 (3 Cir. 1977), on which Southland heavily relies. The case had nothing to do with failure to charge a lesser

included offense; the reversal there was because of the judge's having submitted a conspiracy count with an instruction that the jury could bring in a guilty verdict if it found that defendants had acted in pursuit of any of three objectives when there was insufficient evidence with respect to one, namely, a conspiracy to defraud the United States under § 371. 561 F.2d at 474.

The judgments of conviction are affirmed.

...ted States of America vs.

United States District Court for the Eastern District of New York

DEFENDANT: THE SOUTHLAND CORPORATION

DOCKET NO.: CR-83-00515-01

JUDGMENT AND PROBATION/COMMITMENT ORDER

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date — MONTH: AUGUST DAY: 2 YEAR: 1984

___ WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

X WITH COUNSEL Peter K. Bleakley, Esq. and William J. Baer, Esq.
(Name of Counsel)

PLEA

___ GUILTY, and the court being satisfied that there is a factual basis for the plea. ___ NOLO CONTENDERE, ___ NOT GUILTY

FINDING & JUDGMENT

There being a ~~finding~~/verdict of ___ NOT GUILTY. Defendant is discharged
X GUILTY.

Defendant has been convicted as charged of the offense(s) of violating Title 18, United States Code, Section 371.

SENTENCE OR PROBATION ORDER

The court ordered that the defendant had not shown sufficient cause why judgment should not be pronounced. Because no sufficient cause to the contrary was shown or appeared to the court and the defendant was thereupon sentenced as provided by law and the court ordered that the defendant

A fine of ~~XXX~~ TEN THOUSAND DOLLARS ($10,000.00) is imposed.

A TRUE COPY
ATTEST
DATE AUG 13 1984
CLERK
BY DEPUTY CLERK

FILED
IN CLERK'S OFFICE
U S DISTRICT COURT E.D.N.Y.
★ AUG 3 1984 ★
TIME A.M.
P.M.

SPECIAL CONDITIONS OF PROBATION

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY
X U.S. District Judge
___ U.S. Magistrate

Charles P. Sifton

Date August 2, 1984

RELEVANT STATUTORY PROVISIONS

18 U.S.C. § 371

Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

---

18 U.S.C. § 3282

Offenses not capital

Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

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26 U.S.C. § 6531

Periods of limitation on criminal prosecutions

No person shall be prosecuted, tried, or punished for any of the various offenses arising under the internal revenue laws unless the indictment is found or the information instituted within 3 years next after the commission of the offense, except that the period of limitation shall be 6 years—

> (1) for offenses involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner;

(2) for the offense of willfully attempting in any manner to evade or defeat any tax or the payment thereof;

(3) for the offense of willfully aiding or assisting in, or procuring, counseling, or advising, the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a false or fraudulent return, affidavit, claim, or document (whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document);

(4) for the offense of willfully failing to pay any tax, or make any return (other than a return required under authority of part III of subchapter A of chapter 61) at the time or times required by law or regulations;

(5) for offenses described in sections 7206(1) and 7207 (relating to false statements and fraudulent documents);

(6) for the offense described in section 7212(a) (relating to intimidation of officers and employees of the United States);

(7) for offenses described in section 7214(a) committed by officers and employees of the United States; and

(8) for offenses arising under section 371 of Title 18 of the United States Code, where the object of the conspiracy is to attempt in any manner to evade or defeat any tax or the payment thereof.

The time during which the person committing any of the various offenses arising under the internal revenue laws is outside the United States or is a fugitive from justice within the meaning of section 3290 of Title 18 of the United States Code, shall not be taken as any part of the time limited by law for the commencement of such proceedings. (The preceding sentence

shall also be deemed an amendment to section 3748(a) of the Internal Revenue Code of 1939, and shall apply in lieu of the sentence in section 3748(a) which relates to the time during which a person committing an offense is absent from the district wherein the same is committed, except that such amendment shall apply only if the period of limitations under section 3748 would, without the application of such amendment, expire more than 3 years after the date of enactment of this title, and except that such period shall not, with the application of this amendment, expire prior to the date which is 3 years after the date of enactment of this title.) Where a complaint is instituted before a commissioner of the United States within the period above limited, the time shall be extended until the date which is 9 months after the date of the making of the complaint before the commissioner of the United States. For the purpose of determining the periods of limitation on criminal prosecutions, the rules of section 6513 shall be applicable.

(2) (2)

Nos. 84-1951 and 84-1981

Supreme Court, U.S.
FILED
SEP 18 1985
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

THE SOUTHLAND CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

EUGENE MASTROPIERI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Acting Solicitor General

GLENN L. ARCHER, JR.
Assistant Attorney General

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DONALD W. SEARLES
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Department of Justice
Washington, D.C. 20530
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BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to prove petitioner Southland's intent to defraud the United States (No. 84-1951 only).

2. Whether the district court erred in applying separate statutes of limitations to two distinct objectives of a conspiracy charged in a single-count indictment (No. 84-1951 only).

3. Whether the indictment was properly sealed in order to obtain a witness's testimony (No. 84-1981 only).

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 2

Argument 4

Conclusion 12

TABLE OF AUTHORITIES

Cases:

Anthony v. *United States*, 667 F.2d 870, cert. denied, 457 U.S. 1133 7

Braverman v. *United States*, 317 U.S. 49 8

Dennis v. *United States*, 384 U.S. 855 9

Ingram v. *United States*, 360 U.S. 672 6

Kitchen, In re, 706 F.2d 1266 ..... 10, 11

Leary v. *United States*, 395 U.S. 6 5

Spies v. *United States*, 317 U.S. 492 6

Turner v. *United States*, 396 U.S. 398 5

United States v. *Bryza*, 522 F.2d 414, cert. denied, 426 U.S. 912 7

United States v. *Head*, 641 F.2d 174, cert. denied, 462 U.S. 1132 8-9

United States v. *Klein*, 247 F.2d 908, cert. denied, 355 U.S. 924 ..... 5, 7

United States v. *Michael*, 180 F.2d 55, cert. denied, 339 U.S. 978 10

United States v. *Petersen*, 513 F.2d 1133 7

Page

Cases—Continued:

United States v. *Samara*, 643 F.2d 701, cert. denied, 454 U.S. 829 6

United States v. *Schilleci*, 545 F.2d 519 7

United States v. *Sherwood*, 38 F.R.D. 14, aff'd, 348 F.2d 715, cert. denied, 382 U.S. 843 10-11

United States v. *Slochowsky*, 575 F. Supp. 1562 10

United States v. *Tarnopol*, 561 F.2d 466 6

United States v. *Walsh*, 627 F.2d 88 6

Statutes and rule:

Travel Act, 18 U.S.C. 1952 2

18 U.S.C. 371 ..... 2, 8

18 U.S.C. 3282 7

26 U.S.C. 162(c) 5

26 U.S.C. 6531 7

Fed. R. Crim. P. 6(e)(4) 9, 10

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 84-1951

THE SOUTHLAND CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

No. 84-1981

EUGENE MASTROPIERI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-35a)[1] is reported at 760 F.2d 1366.

JURISDICTION

The judgment of the court of appeals was entered on April 23, 1985. The petition for a writ of certiorari in No. 84-1951 was filed on June 15, 1985, and the petition in No.

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[1]Citations are to the petition and appendix in No. 84-1951 except where noted.

84-1981 was filed on June 20, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioners were convicted of conspiracy, in violation of 18 U.S.C. 371. The one-count superseding indictment charged that petitioners and a co-defendant, S. Richmond Dole, conspired to violate the Travel Act, 18 U.S.C. 1952, and to defraud the United States by impeding the lawful functions of the Internal Revenue Service (IRS). The jury returned a special verdict finding petitioner Mastropieri guilty of conspiring to achieve both objectives and petitioner The Southland Corporation guilty of conspiring to achieve the tax fraud objective.[2] Mastropieri was sentenced to 18 months in prison, and Southland was fined $10,000. The court of appeals affirmed (Pet. App. 1a-35a).

1. The evidence at trial, which is summarized in the court of appeals' opinion (Pet. App. 3a-11a), established that Southland, a retailer that owns and franchises convenience stores, conspired through a number of its executives to defraud the United States by concealing a bribe to Mastropieri that it improperly deducted as an ordinary business expense on its corporate tax return. In 1973, the State of New York instituted administrative proceedings against Southland to recover substantial unpaid sales taxes. While these proceedings were pending, Southland's Northeast Division manager, Eugene DeFalco, was introduced to Mastropieri, an attorney and member of the New York City Council. Mastropieri suggested that he could resolve the sales tax dispute by bribing members of the State's Tax

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[2]The jury did not reach a verdict on the Travel Act objective of the conspiracy charge against Southland or on the charge against Dole.

Commission. Dole, a Southland vice-president, authorized DeFalco to go ahead with the bribery scheme. *Id.* at 3a-5a.

With Dole's approval, DeFalco agreed to make a payment of $96,500 to Mastropieri, purportedly for legal services rendered by Mastropieri to Southland. This amount included Mastropieri's fee and money for bribes of Tax Commission members. Because the funds would be supplied by Southland's headquarters, the proposal was discussed with Southland's chief executive officer. Dole submitted an invoice from Mastropieri to Southland's controller, Eugene Pender, in July 1977, and a check was issued the same day. Mastroprieri laundered the check, and part of the money was used to establish a bribery slush fund. Pet. App. 5a-7a.

In August 1977, Southland's audit committee commenced an investigation into whether the corporation had made any payments to government officials to settle tax and other disputes. On questionnaires, Dole and DeFalco falsely stated that they were not aware of any such payments. However, Pender identified the Mastropieri payment as questionable, and another executive, Frank Kitchen, admitted in an interview that the payoff had been discussed by Dole and DeFalco. Southland's general counsel, Clark J. Matthews II, told the committee that he had spoken to Mastropieri and that there were no irregularities in the payment. The committee's final report did not mention the Mastropieri matter. Pet. App. 8a-10a.

Matthews and Southland staff attorney Michael Davis remained concerned, however, that the corporation would deduct the payment to Mastropieri on its federal tax return. They raised the question with Southland's outside counsel, but did not explain why the payment might not be deductible. During an IRS investigation in the spring of 1978, Matthews instructed Davis to conceal Pender's and Kitchen's statements to the audit committee. In September

1978, Southland deducted the Mastropieri payment as an ordinary business expense on its 1977 corporate tax return. Pet. App. 6a, 10a.

2. The court of appeals affirmed in a comprehensive opinion by Judge Friendly (Pet. App. 1a-35a). With respect to the sufficiency of the evidence, the court of appeals held that Southland purposefully structured the Mastropieri bribe in a manner that resulted in the improper deduction of the payment and that the corporation obstructed the IRS in its attempt to determine the allowability of the deduction (*id.* at 11a-12a). The court of appeals also held that the jury was properly instructed concerning the applicable statutes of limitations and that the government could rely on separate limitations periods for the different objects of the conspiracy charged in the indictment (*id.* at 13a-16a). Finally, the court of appeals determined that the indictment had properly been sealed for six weeks and that the statutes of limitations were therefore tolled during that period (*id.* at 24a-29a).

ARGUMENT

The decision of the court of appeals is plainly correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore unwarranted.

1. Southland argues (Pet. 5-11) that the evidence was insufficient to establish its intent to defraud the United States.[3] The court of appeals correctly rejected this argument as "border[ing] on the frivolous" (Pet. App. 11a).

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[3]Although it found the evidence sufficient in all respects (Pet. App. 11a), the court of appeals upheld Mastropieri's conviction solely on the basis of the Travel Act objective of the conspiracy because certain evidence relating to Mastropieri's involvement in the fraud objective had been erroneously excluded at trial (*id.* at 24a). Accordingly, Southland's arguments, which relate solely to the sufficiency of the evidence and the statute of limitations with respect to the fraud objective, are not germane to Mastropieri's petition.

Southland's argument is that the government failed to prove that at least one of its executives knew that the Mastropieri bribe was not properly deductible under 26 U.S.C. 162(c). Apart from the fact that "it is absurd to suppose that the Southland officials * * * did not know that deductions may be taken only for 'ordinary and necessary' business expenses * * * and that a bribe is not such an expense" (Pet. App. 11a), Southland's argument completely misses the point.[4] Southland was not charged with conspiring to violate 26 U.S.C. 162(c). Rather, it was charged with conspiring to impede the functions of the IRS by preventing the government from discovering the true nature of the claimed deduction. A specific intent to cheat the government out of money is not a necessary element of the offense and was not charged here. See *United States* v. *Klein*, 247 F.2d 908, 916 (2d Cir. 1957), cert. denied, 355 U.S. 924 (1958).

Evidence of Southland's willful obstruction of the IRS was ample. The phony invoice, the false statements to the audit committee, the concealment from the IRS investigating team, and the concern Matthews (Southland's general counsel) exhibited over the deductibility of the bribe all served to demonstrate the corporation's knowing participation in a conspiracy to obstruct the IRS. As the court of appeals noted (Pet. App. 11a), "there was evidence that Dole, DeFalco, Matthews and Davis were all very much concerned that the $96,500 payment was being improperly

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[4]Even if knowledge of the nondeductibility of the bribe were an element of the offense and Southland's officials somehow lacked actual knowledge, the corporation would fare no better. The conduct of Matthews, for example, plainly demonstrated at the very least that his suspicions were aroused. This was sufficient to establish knowledge in view of his failure to make further inquiries. See, *e.g.*, *Turner* v. *United States*, 396 U.S. 398, 416-417 & n.29 (1970); *Leary* v. *United States*, 395 U.S. 6, 46 n.93 (1969).

taken as a deduction." Thus, responsible officials of Southland knew that the payment would improperly be deducted on the corporation's tax return, yet rather than taking steps to prevent this from happening, they affirmatively sought to conceal the true nature of the payment. Nothing more is required. See, *e.g., Spies* v. *United States,* 317 U.S. 492, 499 (1943) (willfulness may be inferred from concealment and making false invoices); *United States* v. *Samara,* 643 F.2d 701, 703 (10th Cir.), cert. denied, 454 U.S. 829 (1981) (willfulness may be inferred from failure to supply accountant with accurate and complete information); *United States* v. *Walsh,* 627 F.2d 88, 92 (7th Cir. 1980) (willfulness may be inferred from false statements to IRS agents).

The cases on which Southland relies are completely inapposite. In *Ingram* v. *United States,* 360 U.S. 672 (1959), the Court reversed the conspiracy convictions of two employees of an illegal gambling operation because they lacked personal knowledge of the tax liability of the entrepreneurs of the operation (*id.* at 678-679). They were unaware that they were helping the persons in charge of the operation to evade payment of taxes. Here, by contrast, the evidence established that Southland's executives structured the bribery scheme with the knowledge that it would generate a corporate deduction and they concealed the true nature of the payment from the IRS. Moreover, the defendants in *Ingram* were charged with conspiring to commit substantive tax offenses rather than to defraud the United States (*id.* at 672-673 & n.1, 678). Finally, Southland's conduct was similar to that of the entrepreneurs in *Ingram,* whose convictions were affirmed because they agreed to conceal their sources of income from the IRS (*id.* at 676-677).[5]

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[5]Similarly, in *United States* v. *Tarnopol,* 561 F.2d 466 (3d Cir. 1977), unlike in this case, there was no evidence that the defendants ever filed inaccurate tax returns, made misrepresentations to the IRS, or contemplated the possibility of tax liability (*id.* at 474). Most of the other cases

2. Southland also argues (Pet. 11-15) that because both the Travel Act and fraud objectives of the conspiracy were charged in a single count, the five-year statute of limitations applicable to the former objective must also apply to the latter, even though a six-year limitations period would have applied to the fraud objective had the two been charged in separate counts. See 18 U.S.C. 3282; 26 U.S.C. 6531. The district court instructed the jury that different statutes of limitations were applicable to the two objectives and that it must find an overt act furthering each objective within the relevant limitations period to convict with respect to that objective. The court also instructed the jury to return special verdicts as to each objective; Southland was convicted only for conspiracy to defraud the United States. Pet. App. 3a, 13a.

The district court's instructions would quite obviously have been proper had the two objectives been charged in separate counts. The court of appeals correctly rejected Southland's "somewhat metaphysical argument" that the rule must be otherwise for a single-count charge, finding the contention to lack "a good sense basis" (Pet. App. 13a-14a):

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on which Southland relies stand only for the proposition that the jury must be instructed that ignorance of the law can be a defense where it obviates the specific intent required for an offense. See *Anthony* v. *United States*, 667 F.2d 870, 876-877 (10th Cir. 1981), cert. denied, 457 U.S. 1133 (1982); *United States* v. *Schilleci*, 545 F.2d 519, 523-524 (5th Cir. 1977); *United States* v. *Bryza*, 522 F.2d 414, 423-424 (7th Cir. 1975), cert. denied, 426 U.S. 912 (1976); *United States* v. *Petersen*, 513 F.2d 1133, 1135 (9th Cir. 1975). Southland complains, however, not of the jury instructions but of the sufficiency of the evidence; these are two different matters. In fact, the district court instructed the jury that it must find that Southland "contemplated loss to the government in the form of income tax which would otherwise have been collected" (Tr. 3087; Southland C.A. App. 688), an instruction unduly favorable to the corporation. See *United States* v. *Klein*, 247 F.2d at 916.

> If the Government adduced sufficient evidence to convince the jury that Southland conspired to defraud it within the six year period * * *, as we have held that it did, we do not see why it should be deprived of a conviction for this violation of 18 U.S.C. § 371 because it failed to establish to the jury's satisfaction that Southland also engaged, during a five year period antedating the indictment, in a conspiracy to violate the Travel Act. * * * If the Government had failed to present sufficient substantive evidence to warrant submission of the Travel Act objective to the jury but did meet its burden with respect to the fraud objective and the jury convicted, [Southland] would surely not have been entitled to have the indictment dismissed. * * * We fail to see how [its] case stands better because the Government did present sufficient evidence to send to the jury the case with respect to * * * both objectives.

Southland contends that the decision conflicts with *United States* v. *Head,* 641 F.2d 174 (4th Cir. 1981), cert. denied, 462 U.S. 1132 (1983).[6] The court of appeals addressed this contention at length (Pet. App. 14a-16a). The court demonstrated that the language in *Head* on which Southland relies was dictum and in any event did not by its terms adopt the rule advanced by Southland; rather, the court in *Head* merely stated that such a rule *may* be appropriate (641 F.2d at 178 n.5). The holding in *Head* was only that a general verdict could not be supported where different statutes of limitations applied to different objectives of a conspiracy and the jury might have convicted on the basis of an objective as to which no overt act occurred

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[6]Southland's reliance on *Braverman* v. *United States,* 317 U.S. 49 (1942), is misplaced. There, the Court permitted separate objects of a conspiracy to be alleged in a single count. That only one statute, 18 U.S.C. 371, is violated misses the point that separate statutes of limitations apply to different sorts of violations of Section 371.

during the relevant limitations period (*id.* at 177-179). Here, the special verdicts returned by the jury obviated that uncertainty. Southland's factbound argument that the jury was confused was considered and correctly rejected by the court of appeals (Pet. App. 14a). Whatever confusion could have arisen would, of course, have been identical had the conspiracy been charged in two counts rather than one.[7]

3. Mastropieri contends (84-1981 Pet. 15-19) that his conviction for conspiring to violate the Travel Act must be reversed because the original indictment was improperly sealed at the time that the statute of limitations ran. His argument is premised on the view that a statute of limitations may be tolled only where an indictment has properly been sealed. Mastropieri asserts that Fed. R. Crim. P. 6(e)(4)[8] permits an indictment to be sealed only when necessary to secure custody of the defendant, which was not the case here, and that even if the Rule does allow sealing for other legitimate objectives, no such purpose was served here. Without passing upon his premise that a timely returned but improperly sealed indictment could violate the statute of limitations, the court of appeals fully considered

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[7]The superseding indictment, returned November 17, 1983, would not have been time-barred even if it had recited the two objectives in different counts (see Pet. 14). Southland is therefore plainly incorrect in arguing that the government engaged in " 'prosecutorial sleight of hand to overcome a time bar' " (Pet. 6, quoting *Dennis* v. *United States*, 384 U.S. 855, 863 (1966)). In fact, as in *Dennis*, "the Government here secured no advantage with respect to limitations" by the manner in which it charged Southland with conspiracy (*id.* at 863-864 n.8).

[8]Fed. R. Crim. P. 6(e)(4) provides:

> Sealed Indictments. The federal magistrate to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. Thereupon the clerk shall seal the indictment and no person shall disclose the return of the indictment except when necessary for the issuance and execution of a warrant or summons.

and correctly rejected both of Mastropieri's arguments respecting the sealing of his indictment (Pet. App. 24a-29a).

The original indictment was returned on March 25, 1983, two days before the expiration of the applicable five-year limitations period. Thereafter, the government secured an order sealing the indictment in order to assist it in obtaining the testimony of Frank Kitchen in the ongoing investigation of Southland and others; Kitchen had been granted immunity but claimed before the grand jury that he could not remember certain events. The indictment was unsealed six weeks later, shortly after the court of appeals reversed a judgment holding Kitchen in contempt with respect to his grand jury testimony, eliminating any hope of securing useful testimony from him. *In re Kitchen,* 706 F.2d 1266 (2d Cir. 1983).

Rule 6(e)(4) authorizes an indictment to be sealed to obtain custody of the defendant; it does not by its terms prohibit the sealing of an indictment for other purposes. The advisory committee notes state that the Rule was intended to continue the pre-Rules practice, which, as the court of appeals noted, permitted an indictment to be sealed whenever the public interest so required (Pet. App. 27a). In a decision rendered three years after the adoption of the Rules, the Third Circuit, like the court here, concluded that Rule 6(e)(4) does not limit the circumstances under which an indictment may be sealed. *United States* v. *Michael,* 180 F.2d 55, 57 (1949), cert. denied *sub nom. United States* v. *Knight,* 339 U.S. 978 (1950). Mastropieri cites no case to the contrary.[9]

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[9]In *United States* v. *Slochowsky,* 575 F. Supp. 1562, 1567 (E.D.N.Y. 1983), the court cited to *Michael* and held only that it is sufficient if there is "a legitimate prosecutorial need for the sealing." In *United States* v. *Sherwood,* 38 F.R.D. 14, 20 (D. Conn. 1964), aff'd on other grounds *sub nom. United States* v. *Doyle,* 348 F.2d 715 (2d Cir.), cert.

The court of appeals correctly resolved the factbound question of whether the sealing was proper here (Pet. App. 29a). The government was justified in its attempt to secure truthful testimony from Kitchen, although a divided court of appeals ultimately ruled that the witness was erroneously held in contempt.[10] Sealing of the indictment was a proper means of ensuring that Kitchen gave complete and truthful testimony and did not tailor his testimony to fit only what was disclosed by the indictment. The district court correctly found that "the sealing, for a period of six weeks, lasted no longer than was necessary to accommodate legitimate prosecutorial interests" (*id.* at 25a). Moreover, as the court of appeals stressed, the government properly relied on the magistrate's decision to seal the indictment (*id.* at 29a):

> This is a point on which great deference should be accorded to the discretion of the magistrate, at least in the absence of any evidence of substantial prejudice to the defendant. The Government should be able, except in the most extraordinary cases, to rely on that decision rather than risk dismissal of an indictment, the sealing of which it might have been willing to forego, because an appellate court sees things differently, after the expenditure of vast resources at a trial and at a time when reindictment is by hypothesis impossible.

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denied, 382 U.S. 843 (1965), the district court simply placed a reasonableness limitation on the length of time that an indictment could be sealed. Even if these decisions did conflict with the present case, they would, of course, no longer be good law since they arose within the Second Circuit.

[10]The majority stated that the government's theory that Kitchen's claimed failure of memory was untruthful was a "plausible" one (*In re Kitchen*, 706 F.2d at 1276). In dissent, Judge Lumbard concluded that it was "incredible" that Kitchen could have forgetten what had transpired (*id.* at 1277).

Finally, the court of appeals observed that Mastropieri "has not even asserted prejudice from the sealing of the indictment for 39 days" (*ibid.*).

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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REPLY BRIEF OF THE SOUTHLAND CORPORATION TO THE BRIEF OF THE UNITED STATES IN OPPOSITION

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TABLE OF AUTHORITIES

	Page
CASES:	
Bridges v. *United States*, 364 U.S. 209 (1953)	5
Hammerschmidt v. *United States*, 265 U.S. 182 (1924)	2
Ingram v. *United States*, 360 U.S. 672 (1959)	2
Leary v. *United States*, 395 U.S. 6 (1969)	3
Sanabria v. *United States*, 437 U.S. 54 (1978)	4
United States v. *Tarnopol*, 561 F.2d 466 (3d Cir. 1977)	1
STATUTE:	
18 U.S.C. § 371	2,4

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REPLY BRIEF OF THE SOUTHLAND CORPORATION TO THE BRIEF OF THE UNITED STATES IN OPPOSITION

Petitioner The Southland Corporation ("Southland") respectfully submits this reply to the Brief of the United States in Opposition: [1]

1. To show the requisite specific "intent to impede and obstruct the functions of the Internal Revenue Service in the manner charged," *United States* v. *Tarnopol*, 561 F.2d 466, 474 (3d Cir. 1977), the prosecution had to establish Southland's

[1] In several key respects, the government's statement of the case neither finds support in the record nor accurately reflects the Court of Appeals' summary of the evidence.

There was, for example, no evidence at trial and no mention in the Court of Appeals' opinion of a conspiracy "to defraud the United States by concealing a bribe to *Mastropieri.*" (Opp. at 2.) (Emphasis added.) Similarly, there is no basis fact for the statement, "Mastropieri suggested that he

(footnote continues)

knowledge that some illicit tax consequence would flow from disguising the alleged bribe as a legal fee. In place of such a burden of proof, the Court of Appeals substituted the aphorism that "ignorance of the law is not a defense." (App. 11a.) The government studiously distances itself from that holding, never once attempting to defend it. The reason is clear. Other courts have held consistently that ignorance of the law is a defense to crime, like this one, requiring proof of specific intent. (*See* Pet. 8-9.)

In its effort to evade the Court of Appeals' holding, the government seeks to redefine the offense alleged. Intent to take an improper deduction, the government argues, was not essential because this prosecution was for conspiracy to defraud the United States in whatever manner. (Opp. at 5.) However, the indictment charged Southland with conspiring to defraud by claiming an improper deduction. Knowledge of the impropriety of the deduction is an essential element of such a conspiracy. Indeed, the acts illegal under the conspiracy to defraud provisions of 18 U.S.C. § 371 are those involving "deceit, craft or trickery, or at least means that are dishonest." *Hammerschmidt* v. *United States,* 265 U.S. 182, 188 (1924). These prohibited means necessarily presuppose knowledge of wrongfulness.[2]

The government's second effort to skirt the Court of Appeals' erroneous holding is no more successful. The govern-

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(footnote continued)

could resolve the sales tax dispute by bribing *members of the State's Tax Commission.*" (Opp. at 2-3.) (Emphasis added.) In fact, no bribe was ever paid or even offered to a public official and there is no indication in the record that Mastropieri or anyone else ever identified any potential recipient or recipients of an illegal payment. Additionally, there is no evidence—and the Court of Appeals' opinion does not reflect any evidence—that a bribe "proposal was discussed with *Southland's chief executive officer.*" (Opp. at 3.) (Emphasis added.) In fact, the District Court specifically ruled that Southland's chief executive officer was *not* a coconspirator.

[2] The government's attempts to distinguish *Ingram* v. *United States,* 360 U.S. 672 (1959), fall flat. The individuals found guilty of conspiracy to evade taxes in *Ingram* " virtually conceded" that they had conspired to conceal taxable income. *Id.* at 677. There was no such concession here. And the government produced no proof, as *Ingram* required, of knowledge by Southland that the government would be defrauded. *See id.* at 678-80.

ment attempts to show that Southland did in fact know that the Mastropieri fee would be deducted improperly.

In support of this contention, the government cites the Court of Appeals' observation that " 'there was evidence that Dole, DeFalco, Matthews and Davis were all very much concerned that the $96,500 was being improperly taken as a deduction.' " (Opp. at 5-6, quoting Pet. App. 11a.) This observation not only was inaccurate,[3] but is inadequate to show specific intent to defraud. The government, therefore, escalates the Court of Appeals' statement to a conclusion that "responsible officials of Southland *knew* that the payment would improperly be deducted on the corporation's tax returns." (*Id.* at 6.) (Emphasis added.) However, there is no rational basis for equating concern about a deduction's propriety with knowledge that the deduction was, in fact, improper.

The government appears nonetheless to attempt such an equation by arguing that suspicions coupled with lack of further inquiry is tantamount to actual knowledge. (Opp. at 5 n.4.) However, this argument—never made below—requires proof both that Southland was "aware of a high probability" the deduction was improper and that it did not "actually believ[e]" the deduction was proper. *See Leary* v. *United States,* 395 U.S. 6, 46 n.93 (1969). There was no such proof.

In sum, the Court of Appeals announced a controlling principle of law which is clearly wrong and which the government does not even attempt to defend. Instead, the government seeks to obscure that holding with factual irrelevancies and misstatements. In actuality, there is no obstacle to review of the

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[3] As previously noted, (*see* Pet. at 4 n.2), there is absolutely no basis in the record for the Court of Appeals' comment, repeated here by the government, that Matthews and Davis "raised the question [of the fee's deductibility] with outside counsel, but did not explain [to outside counsel] why the payment might not be deductible." (Opp. at 3.) The record showed only that Davis raised a question about deductibility of the fee; there was no further evidence of what Davis said to the outside counsel or what the outside counsel said to him. Nor was there any evidence that DeFalco or Dole were at all "concerned that the legal fee was being improperly taken as a deduction." (*Id.*)

Court of Appeals' ruling. This Court should correct the Second Circuit's error before it taints numerous conspiracy prosecutions in that Circuit and elsewhere.

* * *

2. The government suggests that the District Court properly applied two separate statutes of limitations to a single violation of Section 371 because doing so "would quite obviously have been proper had the two objectives been charged in separate counts." (Opp. at 7.)

If, as alleged, Southland was a party to a single conspiracy, then the government's arguments about what would have happened had the two objectives been charged in two counts of the indictment are mere sophistry. Splintering the charges in that manner "would have been subject to objection on grounds of multiplicity, the charging of a single offense in separate counts." *Sanabria* v. *United States*, 437 U.S. 54, 65 n.19 (1978).

In other words, if the prosecution *could* have framed a two-count indictment, then it *should* have done so. Rather than allege two separate crimes, however, the prosecution alleged a single crime, based on a single conspiratorial agreement. That one agreement can have but *one* penalty—and *one* statute of limitations. By flaunting this straightforward and logical proposition, the government needlessly confused the jury.[4] Particularly since the government contends that the same

[4] The government states that the Court of Appeals rejected the argument that the jury may have been confused. (Opp. at 9, citing Pet. App. 14a.) Of course, as previously noted, the Court of Appeals was itself confused when it attempted to perform the task that supposedly presented no problem for the jury. (*See* Pet. at 14, citing Pet. App. 3a.)

The government also states that "[w]hatever confusion could have arisen would, of course, have been identical had the conspiracy been charged in two counts rather than one." (Opp. at 9.) Putting aside for a moment the issue of multiplicity, *see supra*, the proposition is a dubious one. If the government had alleged the conspiracy in two counts, the prosecution, rather than the jury, would have been required to allocate the various overt acts between the unlawful objectives charged. And the government would not have been able to argue during the appeals process that certain acts, which it previously conceded to be associated only with the *bribery* objective, now support Southland's conviction on the *tax fraud* objective.

conduct which constituted the conspiracy to bribe also grounded the conspiracy to defraud, the obvious purpose of the tax charge—conceded by the government before trial—was to squeeze another year into the limitations period. This Court has not permitted such statutory manipulation, *Bridges* v. *United States,* 346 U.S. 209 (1953), and should not now.

Respectfully submitted,

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